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FORBIDDEN BY THE LAWS OF GOD
AND OF THE CHURCH

revised by
F. W. PULLER

OF THE SOCIETY OF S. JOHN THE EVANGELIST, COWLEY

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PREFACE

EVER since the passing of the Deceased Wife's Sister's Marriage Act in 1907, followed, as it was, by the calamitous decision of the Dean of Arches in the case of *Banister and Wife v. Thompson*,¹ I have felt a desire to write something on the matter which forms the subject of this treatise. And this desire was made more intense, when I found that so many members of the Church, for whose judgement in questions of this sort I have been accustomed to feel a very high respect, seemed to be unaware of the seriousness of the divergence from the revealed will of God, which would be brought about, if the Church should tolerate within her communion such flagrant breaches of the Divine law, as would result from any general acquiescence in the principles of the decision of the Court of Arches.

For two years after that decision was given I was absent from England, and for most of that time was far removed from all access to good theological libraries, and consequently I had no opportunity for making any adequate preparation for such a discussion of the subject as seemed to be needed.

¹ On this decision and on the judgement in which it was set forth, see below, pp. 126-130.

In October 1909 I took part in the sessions of the Provincial Synod of the Church of the Province of South Africa, which was held in Capetown. In the course of that Synod a motion was made to add a new clause to the South African canon on Holy Matrimony, which clause was to run as follows :—
“Notwithstanding anything in these Canons to the contrary, persons lawfully contracting a deceased wife’s sister union shall not thereby be debarred from receiving the Sacrament of the Lord’s Supper.”
The debate on this motion lasted more than two days, and when the division was taken, the Synod voted by orders, the Lay House voting first. I am thankful to say that the Laymen rejected the motion by 21 noes to 6 ayes. The motion having been negatived by the Laity, there was no need for a vote to be taken in either the House of the Clerical Representatives or in the House of the Bishops.

At the end of the session of the Provincial Synod I returned to England, and a year later, in November, 1910, I gave a course of four lectures on the subject of marriage with a Deceased Wife’s Sister, in the crypt of S. Paul’s Cathedral, to the members of the S. Paul’s Lecture Society. The substance of those lectures forms part of the book which I am now publishing.

I feel sure that this book might have been much better done ; but I also feel sure that, imperfect as it is, its main thesis is firmly grounded on Holy Scripture and on Catholic tradition, and that it expresses the teaching of the Church of England.

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For that reason I hope that it will be widely read not only by the Clergy but also by the Laity. And as at present there is real danger that the Church may be induced to condone these incestuous unions by admitting those who have contracted them to Holy Communion without first requiring the guilty partners to separate from each other, I would urge all faithful children of the Church to bring the book to the notice of others, who might not otherwise become aware of its existence. May God in His mercy avert from us the sore punishments which will surely come upon our Church if, after 1300 years of faithful witness, she now betrays in so vital a matter the trust which has been committed to her.

I have to return my most cordial thanks to my friend, Dr. Stone, the Principal Librarian of the Pusey House, for taking the trouble to read through the proofs and for supplying me with several corrections and helpful suggestions.

F. W. PULLER, S.S.J.E.

S. EDWARD'S HOUSE, WESTMINSTER,
December 8, 1911.

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MARRIAGE WITH A DECEASED WIFE'S SISTER

CHAPTER I

NEAR RELATIONSHIP BY AFFINITY CONSTITUTES A BAR TO MARRIAGE

FROM the time when Christianity was first brought by S. Augustine to the men of Kent, at the end of the sixth century, up to the present time, marriage with a deceased wife's sister has been not only forbidden by the Church of England, but has been regarded and treated by her as null and void from the beginning, as being in fact no marriage at all, but merely an incestuous union, forbidden not only by the Law of the Church, but also by the Law of God.

Moreover, from the time when the kings of the Heptarchy became Christian up to the year 1907, the Law of the Church of England in regard to this matter was accepted by the State or Commonwealth of England, so that both Church and State were agreed on this point, and spoke with one voice.

Since 1907 there has been a divergence on this

matter between the two powers. The Church, faithful to what she believes to be the law of God, has continued to teach what she has taught for more than 1300 years. On the other hand, the State, in the year 1907, changed its mind, and has made civilly lawful what God had declared to be unlawful.

The teaching of the Church is perfectly clear. It is contained first of all in the "Table of Kindred and Affinity, wherein whosoever are related are forbidden in Scripture and our Laws to marry together." This Table is ordered by the Canons to "be in every church publicly set up and fixed at the charge of the parish," and, as we all know, the requirement of the Canon is normally carried out in the churches of our land. The Table is also usually printed at the end of our Prayer-books. The Table contains sixty prohibited degrees, some of relationship by consanguinity and some of relationship by affinity, and among the latter the following prohibition is found: "A Man may not marry his Wife's Sister."

The Church gives further teaching on this matter in the 99th Canon of 1603, which runs thus: "No person shall marry within the degrees prohibited by the Laws of God, and expressed in a Table set forth by authority in the year of our Lord God 1563. And all marriages so made and contracted shall be judged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall by course of law be separated."

But the teaching contained in the Table of Kindred and Affinity and in the 99th Canon of 1603 was not *new* teaching. The Table and the Canon merely declared the ancient law of the Church, as it had been held by the Church Universal from the Day of Pentecost, and as it had been held by the Church of England from the time of her foundation at the end of the sixth century. That teaching had been expressed all through the ages in the canons of Councils, and in the decisions of Ecclesiastical Courts, and in the writings of the Fathers of the Church, and of the Theologians and Canonists; and the law laid down in the Table and in the 99th Canon has, since the year 1603, been continually applied and enforced by the diocesan and provincial courts of the Church of England up to the present time. It is a living law, which has never become obsolete.

Moreover, as soon as the State in England became Christian, it took over this law from the Church and made it its own. As Hammick, in his standard work on the *Law of Marriage* (p. 31, 2nd edit.), says: "Those near of kin within the Levitical degrees were forbidden to intermarry, alike by the Common Law of England and by the ancient Canon Law."

But four years ago, in 1907, the Imperial Parliament passed an Act, known as "The Deceased Wife's Sister's Marriage Act," which contains, among other things, the following statement: "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or

without, shall be *deemed* to have been, or *shall* be, void or voidable, as a civil contract, by reason only of such affinity."

The result of the passing of this Act is to produce a very serious state of things. The State permits as a valid civil contract a class of marriages which God's Law and the Church's Law brand as incestuous, and therefore null and void.

Now, I do not think that the laity of the Church of England realise how serious this state of things is; and I am afraid that many of the clergy are in the same condition. And, unfortunately, there is much reason to fear that the state of things will get worse rather than better. As a consequence of the State having permitted these marriages to be contracted "as a civil contract," the Dean of Arches, Sir Lewis Dibdin, has admonished Canon Thompson for having repelled from the Holy Communion Mr. Banister, who had married his deceased wife's sister; and further, he admonished him to refrain from similar acts in the future. Thus the new Act of Parliament is being used to compel the clergy to give the Holy Sacrament of our Lord's Body and Blood to persons who, according to the Law of God and of His Church, are living in open and notorious incest.

It is true that the question whether a prohibition shall issue in the case of *Banister v. Thompson* is not yet finally settled. There was a first appeal, and now there is a second appeal to the House of Lords which has yet to be heard. If the House of Lords refuses to grant a prohibition, as it very

likely may, the situation may become acute in the extreme. It will still be the bounden duty of the clergy to refuse to communicate persons living in open and notorious incest ; but I apprehend that they will become liable to severe penalties if they do refuse. They will be held to be contumacious, and in the end they may very probably be deprived of their benefices, or perhaps imprisoned.

It seems to me to be very important that the faithful laity, most of whom may very probably have never had any opportunity of studying this subject, should be helped to understand the reasons or some of them, which have led the Church from the earliest ages of her existence to regard marriage with a deceased wife's sister as being a union prohibited by the Law of God, and that they should also be sufficiently provided with evidence proving that the Church has continuously enacted laws based upon the Law of God, which forbid these marriages and proclaim them to be no marriages at all.

So much by way of preface. And now, before I begin to discuss the particular case of affinity, with which I shall have mainly to deal, let me make a few remarks on the more general point, that near relationship by affinity within certain defined limits, is, according to the Divine Law, a bār to marriage.

Perhaps I had better start by explaining the meaning of the term "affinity," and how "affinity" differs from "consanguinity."

I will take the term "consanguinity" first.

When two people are descended from a common ancestor, so that his or her blood runs in the veins of both parties, they are said to be related by consanguinity. In other words, they are blood-relations. Thus a father and son, or a mother and son, are related by consanguinity, and so are two brothers, or a brother and sister; and, similarly, an uncle and his nephew, or an uncle and his niece, are related by consanguinity, and so are two first cousins. One might multiply instances indefinitely.

On the other hand, relationship by affinity between two persons may be described as relationship by marriage. Thus a husband is related by affinity to his wife's blood-relations. He is also related by affinity to the wives of his own blood-relations. He is related by affinity to his mother-in-law, and to his step-mother, and to his sister-in-law, and to his daughter-in-law, and to his step-daughter, and to his aunt-in-law, and to his niece-in-law.

Relationship by affinity between two persons does not depend on the blood of a common ancestor running in the veins of both. It depends on the great principle declared by God in the beginning, and reasserted by our Lord, concerning a man and his wife—namely, that the "twain shall become one flesh; so that they are no more twain, but one flesh." This sacred unity is wrought by God in and through the Divine institution of marriage. It is this divinely wrought unity that makes polygamy and divorce so wicked among Christians, who

are in possession of the Divine institution of marriage in its integrity. And it is this unity which creates a relationship between the husband and the blood-relations of his wife, and also between the wife and the blood-relations of her husband. These new relationships brought into existence by the marriage are relationships by affinity.

There are, I am afraid, many persons nowadays who say: "Why should affinity create any bar to marriage? We can understand that the marriage of near blood-relations is highly objectionable. Experience shows that the children of such marriages are often defective, either physically or mentally, or both. We quite agree that a son should be forbidden to marry his mother, and a brother should be forbidden to marry his sister, and an uncle should be forbidden to marry his niece. But we cannot see why, after his wife's death, a man should not marry her blood-relations, her mother, for example, or her sister, or her niece. They are in no way his blood-relations. There is no reason to suppose that the issue of his marriage with them would be in any way degenerate or defective." When people argue like that, it becomes perfectly clear that they have no proper conception of the completeness of the unity between husband and wife, which is brought about by marriage. In the words of our Lord, "They are no more twain, but one flesh." The wife's mother becomes a second mother to her husband, the wife's sisters become sisters to her husband, the wife's niece becomes a niece to her husband; and the

wife ought to be able to invite her near blood-relations to her home, and to bring them into all the intimacies of her family life, without the slightest fear of their becoming rivals to herself in the affections of her husband. He may have a filial love for her mother, and a brotherly love for her sisters, but anything beyond that must be outside the bounds of possibility. And, assuredly, the only secure safeguard for such a state of things is the divinely revealed principle that, neither during her life nor after her death, can he ever by any possibility marry them.

It always seems astounding to me that it should be possible to find Christian men, who do not shrink with horror from the thought of a widower contracting marriage with the near blood-relations of his deceased wife. Why, even a heathen man like Cicero regarded unions of that sort as abominable. In his Oration, *Pro Cluentio*, he relates how a Roman lady, Sassia, married her son-in-law, Melinus, who had divorced his wife. In this case, it happened that Sassia was not only the mother-in-law, but also the aunt of the man whom she married. But the blood-relationship in the third degree of the two persons made no great impression upon Cicero. He does not allude to it in his comments. What horrified him was that two people should marry who were so closely related by affinity in the first degree. These are his words: "The mother-in-law wedded her son-in-law, with none to take the auspices, and with none to give the bride away, amid the gloomy forebodings of

all. Oh, the incredible wickedness of the woman ! (*O mulieris scelus incredibile !*) : wickedness such as in my whole life I have never heard of the like, save in her case alone. What unbridled furious lust ! What unexampled audacity !"¹

That was the righteous feeling of Cicero, and not only of him, but of all those who witnessed or heard of this marriage of Sassia's. The law of nature written on their hearts taught them to realize the hatefulness of the proceeding. And yet there are Christian men and women in England who can see nothing to object to in marriages contracted by parties who are closely related by affinity. All I can say is that, at any rate as regards this matter, their moral standard must be inconceivably lower than that of the heathen Romans who lived in the degenerate days of the later Republic, and before the coming of our blessed Lord.

But it is time to pass from the witness of the law of nature, written in the hearts of the heathen, to the far more explicit and detailed testimony of God's revelation, as we find it recorded in the pages of the Bible.

I will begin with the witness of the New Testament. And I find that in the New Testament there are only two references to marriages within the prohibited degrees, and both of these references are to the marriage of persons closely related to each other by *affinity*. The one is of a step-son marrying his step-mother. The other is of a

¹ Cicero, *Pro Cluentio*, cap. v.

brother-in-law marrying his sister-in-law. But before dealing with these two cases I wish first to call attention to the fact that the New Testament makes no explicit mention of any marriages between persons closely related by consanguinity. At any rate, if any such marriages are mentioned in the New Testament, no attention is called to the close relationship, and no blame on account of the relationship is attached to the marriage. Do, then, the Scriptures of the New Testament allow near blood-relations to marry? Certainly not. The New Testament presupposes the Old Testament. And in the Old Testament God had provided a code of moral laws relating to prohibited degrees both of consanguinity and of affinity. The moral code of the Old Testament was taken over in its entirety by our Lord, except that in certain details He made it more severe. Some things had been allowed under the old covenant owing to "the hardness of men's hearts," which could not be allowed under the new covenant of grace. But, speaking generally, the moral code of the Old Testament was continued by the New. Therefore our Lord said: "Think not that I am come to destroy the Law, or the prophets: I am not come to destroy, but to fulfil (or complete). For verily I say unto you, Till heaven and earth pass away, one jot or one tittle shall in no wise pass away from the Law, till all things be accomplished. Whosoever therefore shall break one of these least commandments, and shall teach men so, shall be called least in the kingdom of heaven: but whoso-

ever shall do and teach them shall be called great in the kingdom of heaven. For I say unto you, That except your righteousness shall exceed the righteousness of the scribes and Pharisees, ye shall in no wise enter into the kingdom of heaven.”¹

Thus our Lord in no way came to abrogate the Moral Law of God recorded in the Pentateuch. He came to carry on that Moral Law, and to complete it. He also came to pour out His Holy Spirit into the hearts of His people in order to enable them to keep the requirements of the Moral Law far more perfectly than had been possible under the old covenant.

Now, the code of prohibited degrees, whether of consanguinity or of affinity, laid down in the Pentateuch, needed no completion. On that point God had fully revealed His mind in the Old Testament, and therefore there was no necessity for Christ to promulgate any fresh legislation on those matters. We need not therefore be astonished that in the New Testament no reference is made to the wickedness of marriages between near blood-relations. For the same reason, there was no necessity to mention in the New Testament the wickedness of marriages between persons closely related by affinity; but perhaps God foresaw that in the latter days men bearing the Christian name would be found who would be so ignorant or so degraded as to deny that relationship by affinity need be any bar to marriage. Anyhow, whatever be the reason, explicit mention is made in the New Testament of the wickedness

¹ S. Matt. v. 17-20.

of persons closely connected by affinity, who should intermarry.

First, there is the case mentioned by S. Paul in his First Epistle to the Corinthians, where a stepson enters into an incestuous union with his stepmother. S. Paul says : "Actually, there is reported to be among you *fornication* (unlawful marriage), and such fornication (unlawful marriage) as does not exist even among the *heathen*, that one of you should have for wife his *father's* wife."¹

Observe, there was no blood-relationship between the two persons here mentioned. Their relationship was entirely a relationship of affinity. But S. Paul speaks of the man's action with horror, as being something which not even a heathen would do. Yet some of the Corinthian Christians, entirely misunderstanding S. Paul's teaching about the law, were actually puffed up on account of this licentious act of their brother-Christian, as if he were rightly exercising his Christian liberty by a gross breach of God's Law. S. Paul, in his fervent charity, determined to do what he could to save this poor deluded soul. He decided to deliver him over unto Satan for the destruction of the flesh. The delivery of the man to Satan would no doubt result in the infliction of some grievous disease, which would or might lead the sufferer to true repentance, and thus enable him to escape the *eternal destruc-*

¹ Bishop Westcott, commenting on Eph. v. 3, says of the word *πορνεία* : "This is a general term for all unlawful intercourse (1) adultery: Hos. ii. 2, 4 (LXX); Matt. v. 32; xix. 9; (2) unlawful marriage, 1 Cor. v. 1; (3) fornication, the common sense as here."

tion¹ which would otherwise come upon him in the great day of the second coming of the Lord Jesus. S. Paul carefully explains that the purpose of his action was that the man's spirit might be saved in the day of the Lord Jesus.

There are people in our twentieth century who would be inclined to say : Was not this treatment which S. Paul meted out to the Corinthian very severe and drastic ? Perhaps the poor man did not realise the sinfulness of what he was doing. Was it right to regard him as "an open and notorious evil liver" ? Would it not have been better if S. Paul had admitted him to the Holy Communion ? Assuredly the Apostle would have felt that to act according to these twentieth-century notions would have been a treasonable dereliction of duty. It would have been cruel to the incestuous man and to his incestuous partner, who would never have realised the hatefulness of their sin. It would have been cruel to the Church, which would have been left without any clear principles to go upon in regard to the prohibited degrees ; and it would have been a sacrilegious profanation of the Holy Sacrament of our Lord's Body and Blood. S. Paul followed the righteous, the charitable, the Christian line, when he summed up the whole matter with his apostolic injunction to the Church of Corinth : "*Put away the wicked man from among yourselves.*"²

Let us pass to the other New Testament case of incest. It is the case of a brother-in-law marrying

¹ For this expression, see 2 Thess. i. 9.

² 1 Cor. v. 13.

his sister-in-law. Herodias was married in the first place to Herod Philip. Then she separated from him. No doubt she followed the example of her grandmother Salome, who, contrary to Jewish custom, but in accordance with Roman custom, took the initiative, and sent a bill of divorce to her husband, Costobarus, and thus dissolved her marriage with him. Similarly, Herodias dissolved her marriage with Philip,¹ and then proceeded to marry his half-brother, Herod Antipas, who was thus the brother-in-law, or rather half-brother-in-law of his new wife. Such a union was incestuous, and therefore abominable. It was, in fact, a doubly incestuous union. Herodias was by blood the half-niece of her new husband, Herod Antipas. But the relationship by affinity was in the second degree, whereas the relationship by consanguinity was in the third degree; and, therefore, when our Lord's holy forerunner, S. John the Baptist, came to Herod Antipas and rebuked him for his incestuous marriage, he said nothing to him about his blood-relationship to her. What he said was, "*It is not lawful for thee to have thy brother's wife.*"² It was the close relationship by affinity which put the more distant relationship by consanguinity into the shade, and filled S. John with holy horror. Then the glorious Baptist "boldly rebuked vice"—

¹ Antipas married Herodias (see S. Mark vi. 17), and there is no suggestion either in the New Testament or elsewhere that Herodias was a polyandrist. She must therefore have dissolved her marriage with Philip. So long as that marriage legally lasted, it would have been impossible for Antipas to marry her.

² S. Mark vi. 18.

namely, the abominable vice of incest, and after some months of imprisonment he died a martyr's death, "patiently suffering for the truth's sake." This is how the Baptist treated an incestuous marriage of a brother-in-law to a sister-in-law, when both parties were unbaptized. How much more are we of the clergy bound to go to prison ; and, if it be necessary, to death, rather than administer the Body and Blood of our Lord to baptized Christians who, although they are related as brother-in-law to sister-in-law, dare to unite themselves incestuously to each other in defiance of the law of God ! If, out of cowardice, or out of mistaken deference to the unrighteous decisions of courts of law, or it may be to the orders of our ecclesiastical superiors, we communicate such "notorious evil livers," what defence shall we make for ourselves in the Day of Judgement ? Will an Act of Parliament or a decision of the Court of Arches avail us in that day ? I trow not.

CHAPTER II

THE MORAL LAWS CONTAINED IN THE OLD
TESTAMENT ARE BINDING ON CHRISTIANS

I HOPE that I have succeeded in showing that, according to the teaching of the New Testament, near relationship by affinity constitutes a bar to marriage. It is true that, if we had only the New Testament, it might not be easy to draw up with accuracy a complete table of the prohibited degrees of consanguinity and affinity. But, as I have already indicated, the New Testament presupposes the Old Testament ; and in the Old Testament God has given a code of moral laws dealing with the question of the prohibited degrees ; and that being so, it might be thought natural that I should proceed at once to discuss the Old Testament matrimonial code.

But under existing circumstances, I shrink from entering on a discussion of the code preserved in the Book of Leviticus, until I have considered the question whether the moral laws contained in the Old Testament are binding on Christians. I feel almost ashamed to enter on the consideration of such a question ; the point seems to belong to such a very elementary stage of Christian teaching. But history teaches us that occasions do arise, when

very elementary Christian truths, having become obscured, need to be re-stated and vindicated. And I believe that at the present time it is desirable to re-state and vindicate, of course only in a summary way, the doctrine of the perpetuity of the moral law of the Old Testament, and of the obligation, which is laid on Christians, of fulfilling it.

I have already pointed out that this doctrine is explicitly stated by our Lord in the Sermon on the Mount, in that passage where our Lord is recorded to have said : "Think not that I am come to destroy the Law, or the prophets : I am not come to destroy, but to complete. For verily I say unto you, Till heaven and earth pass away, one jot or one tittle shall in no wise pass away from the Law, till all things be accomplished."¹ That passage, taken by itself, is sufficient to prove the doctrine which I am considering. I am writing for Christians who recognize our Saviour as their Lord and their God, and are ready to accept His teaching as conclusive. But the teaching of our Lord may perhaps be received with more full surrender, if I show that the Apostles and Fathers and later theologians have understood it in its plain meaning.

I will take S. Paul as the representative of the Apostolic College, and no objection can be taken to this choice, because S. Paul is often regarded as the great antagonist of the Law ; and it cannot be denied that, when he is considering the Judaic and Judaizing teaching which regarded obedience

¹ S. Matt. v. 17, 18.

to the Mosaic Law as the meritorious cause of justification, he does see in abstract law "an imperious principle, an overwhelming presence, antagonistic to grace, to liberty, to spirit, and (in some aspects) even to life."¹ But S. Paul has other things to say about the Law,² when it is "viewed according to its true idea as the expression of God's will, and the guide of man's obedience."³ In the seventh and eighth chapters of his Epistle to the Romans, he treats of the Law of Moses at great length; and speaking of that Law he says: "We know that the Law is spiritual";⁴ and again he says: "So the Law is holy, and the commandment holy, and righteous, and good."⁵ Then he goes on to point out that, apart from the grace of the new covenant, fallen man, through the weakness of his flesh, could not rise up to the lofty standard which the Law proclaimed. It needed that the Son of God should become incarnate and should die, and should rise again and ascend into heaven, first, that our breaches of the Law might be forgiven; and secondly, that the Holy Ghost might come and dwell in our hearts to enable us to keep that holy and good and righteous and spiritual Law. Or,

¹ Bishop Lightfoot, *Fresh Revision of the New Testament*, p. 99.

² Similarly Dr. Llewelyn Davies (*Expositor*, series vii., 36th year, p. 259, March 1910) describing S. Paul's attitude towards the Jewish Law, says: "Law thus *substituted for grace* had a killing power on the anxious soul, and a true bearer of the Gospel had to treat the Law as an enemy. But as an instruction in the will of God the Law was to be honoured and valued. Children of God, rejoicing in forgiveness and reconciliation, were still bound to observe the Law."

³ Dr. Gifford's Introduction to his Commentary on the Epistle to the Romans (*Speaker's Commentary on the New Testament*, vol. iii. p. 48).

⁴ Rom. vii. 14.

⁵ Rom. vii. 12.

to put the truth in S. Paul's own words: "For what the Law could not do, in that it was weak through the flesh, God, sending His own Son in the likeness of sinful flesh and on account of sin, condemned sin in the flesh, *in order that the righteous requirement of the Law* (τὸ δίκαιωμα τοῦ νόμου) might be fulfilled in us, who walk not after the flesh, but after the Spirit."¹ Of course, S. Paul is speaking in this passage of the *moral* sections of the Mosaic Law. He has no intention of suggesting that our Lord became incarnate, and carried out His redeeming work, in order that the requirements of the *ceremonial* and *civil* sections of that Law should be fulfilled in Christians, who walk after the Spirit.

At this point it may be helpful to quote explanations of this passage from the Epistle to the Romans, written by well-known modern commentators belonging to different Christian bodies, that it may be seen how widespread is the recognition that S. Paul taught the perpetuity of the Mosaic Moral Law.

Dr. Liddon in his *Explanatory Analysis of S. Paul's Epistle to the Romans* teaches that in Rom. viii. 3-9, S. Paul is dealing with the "freedom of the regenerate from . . . the inward rule of the sin-principle." This freedom from the law of sin is, he says, "secured under the Gospel" "by God's mission of the Eternal Son into the world"; for the "ultimate object of His appearance among men" is "that the rightful demand of the Mosaic

¹ Rom. viii. 3, 4.

Moral Law¹ might be fulfilled in us who walk not after the rule of *σάρξ* (flesh), but after that of *Πνεῦμα* (Spirit)."²

Similarly, the great Roman Catholic commentator, Estius, in his explanation of Rom. viii. 4, first lays down that this verse is an effective weapon against the *Pelagians*; and then he adds: "This passage of the Apostle is no less effective against the heretics who deny that the Law is fulfilled by a man who has been justified by the grace of Christ. For if it is not fulfilled, the Son of God was sent down from heaven to earth in vain, since the Apostle testifies that He was undoubtedly sent for this purpose, namely, 'that the justification of the Law might be fulfilled in us,' " "that is," Estius says, "that we should fulfil the Law, and by doing it should become righteous"; and he explains that by the term "Law" is meant "the Decalogue" of Moses.³

Dr. Joseph Agar Beet, a learned Wesleyan commentator, dealing with this same passage of the Epistle to the Romans, says: "God sent His Son to dwell in human flesh, that the Spirit of God, and no longer the flesh, may direct our steps; and that the purpose for which the *Law of Sinai* was given may be achieved in us. . . . That the Holy Spirit, given to those who believe the words

¹ The expression, *τὸ δίκαιωμα τοῦ νόμου*, in Rom. viii. 4, is explained in Thayer's translation and enlargement of Grimm's Wilke's *Clavis Novi Testamenti* (edit. 1901) as being used "collectively of the (moral) precepts of the same (*i.e.* the Mosaic) Law."

² Liddon, *Explanatory Analysis*, edit. 1899, p. 127.

³ Estii *in omnes Pauli Epistolas Commentarii*, edit. Mogunt., 1841, tom. i. pp. 214, 215.

of Christ, prompts and enables them to obey the *words of Moses and the Prophets* is another harmony of the old and the new, and therefore confirms the Divine origin of both. And that Christ came in order that the Law might be fulfilled, proves the importance and *eternal validity* of the Law." ¹

Dr. Godet, the illustrious Presbyterian commentator of Neuchâtel, in his *Commentary on the Epistle to the Romans*, takes occasion to discuss the meaning of the word *δικαίωμα* in Rom. viii. 4, and he says : "The matter in question, according to the context and the terms employed, is *what the Law demands of man*. All the postulates contained in the righteousness demanded by the Law (compare the Sermon on the Mount, for example) are *fulfilled in us*, as soon as we *walk*, no more *after the flesh*, but *after the Spirit*. For, as we have seen, the Law being 'spiritual,' ² must coincide at all points in its statutes with the impulses of the Spirit." Godet,³ following S. Paul, shows very convincingly that, according to Christian teaching, there is no real opposition between the idea of a moral code on the one side and the idea of a Divine indwelling power on the other side. . If the code itself comes from God, or has received the sanction of God, it must be a spiritual code, and it will be found to coincide in all points in its

¹ Beet's *Commentary on S. Paul's Epistle to the Romans*, 6th edit., 1887, pp. 225, 226.

² Rom. vii. 14.

³ Godet's *Commentary on the Epistle to the Romans*, Revised English Translat., p. 283.

statutes with the impulses and leading of the indwelling Spirit.

Dr. Du Bose, in his able treatise, *The Gospel according to S. Paul*, puts very clearly the point on which I am insisting. His words run thus: "There is so much said in S. Paul's presentation of the Gospel of the impotence and consequent superseding of the Law, that we are in danger of forgetting under his seeming disparagement how much he is really magnifying it. The fact is that the Gospel itself is only the Gospel in so far as it is the true and only fulfilling of the Law. The Gospel is the power to fulfil the Law."¹ It is a great pleasure to me to recall the fact that, in a review of the above-cited work of Dr. Du Bose by Dr. Sanday, the reviewer says among other things, "I should . . . like . . . to call attention to what seems to me to be a particularly valuable paragraph on the place, in history and in the Divine scheme, of the Law. This is very apt to be misunderstood, and the following comments will do more than anything I remember to have seen to redress the balance."² And then Dr. Sanday quotes the paragraph, of which the passage from Du Bose cited above forms the beginning.

We have now in a very summary way studied the teaching of S. Paul in regard to the abiding value and authority of the Mosaic Moral Law, regarded as the expression of God's will and the guide of man's obedience; and we have seen that many

¹ Du Bose, *The Gospel according to S. Paul*, pp. 24, 25.

² *Expositor* for May 1907, seventh series, xxxiii. 401.

of the very best modern commentators, belonging to different schools of thought and to different portions of Christendom, agree substantially in their interpretation of the Apostle's doctrine, and hold that in his view the authority of the Mosaic Moral Law is perpetuated under the Gospel.

But in order that this position may be more solidly established, it will be well to consider it in the light of the teaching of the Fathers and Schoolmen as well as of some later authorities. In a subsequent chapter I shall be considering somewhat minutely the teaching of these writers, and of the Councils of the Church in regard to the question of marriage with a deceased wife's sister, which is the main subject of this treatise. At the present stage, I shall content myself with bringing forward quotations from a few representative writers, for the purpose of showing that the teaching of our Lord and of S. Paul about the perpetuity of the Mosaic Moral Law was transmitted to modern times through the channel of great teachers belonging to the patristic and mediæval periods.

I will begin with S. Cyprian's master, Tertullian, who, though he fell away into Montanism, is nevertheless accepted as a Father of the Church ; because, when he is not setting forth the mistakes and fancies of Montanism, he is such an eloquent expounder of the common belief of the Catholic Church in the first quarter of the third century. In his treatise, *De Monogamiâ*, Tertullian says : " Since certain persons sometimes assert that they have

nothing to do with the Law (though Christ did not destroy it, but completed it), and sometimes they catch at such parts of the Law as they choose ; now we too plainly declare that the Law has died in this sense, namely, that its burdens, which according to the recorded opinion of the Apostles, not even our fathers were able to bear, have come to an end ; but such parts of the Law as relate to *righteousness* not only remain permanently reserved, but have even been enlarged in their scope, in order, of course, that our righteousness might exceed the righteousness of the scribes and Pharisees."

Here the parts of the Law which "relate to righteousness" are evidently the *moral* sections of the Law ; and Tertullian, basing his judgement on the words of our Lord in the Sermon on the Mount, declares that under the new covenant these moral sections of the Law are not only perpetuated, but made stricter ; whereas, in his opinion, the "*burdens*" of the Law, that is, the ceremonial and civil sections of it, have come to an end.

Passing now from Tertullian to the great S. Augustine of Hippo, the difficulty is to choose the most telling passage out of the numbers of passages which, as it were, cry aloud to be quoted. But, on the whole, I will select a passage from the third book of S. Augustine's treatise, addressed to Pope Boniface of Rome, in answer to Two Epistles of the Pelagians. S. Augustine is speaking of the Law given to the people of Israel, and recorded in the Scriptures of the Old Testament ; and he says :—

"For, in fact, if we first put on one side the sacraments of the old books [that is, the Mosaic Ceremonial Law], which were only enjoined for typical purposes, . . . the remaining precepts, which have to do with piety and good morals, must not, by any forced interpretation, be explained in a typical sense, but are assuredly to be strictly obeyed in accordance with the letter of the command. For no one should have any doubt that that ancient Law of God was not only necessary for the people of Israel in old times, but is now also necessary for us for the right ordering of our life. For if Christ took away from us that most burdensome yoke of many observances, so that we are not circumcised according to the flesh, nor do we offer sheep and cattle in sacrifice, nor do we even rest from necessary works on the Sabbath, when the seventh day comes round, nor regard ourselves as bound to fulfil other things of this kind; but we retain them in their spiritual signification, and the typical shadows having passed away, we are awake in the light of the realities which those shadows typified; shall we, on account of this, say that we have nothing to do with that which is written in the Law [in Lev. vi. 3, 4], namely, that whoever finds something belonging to another man, that has been lost, should return it to its owner? And, similarly, that we have nothing to do with many other precepts of that sort, by which men are taught to live piously and uprightly, and, above all, with the Decalogue itself, which was engraved on those two tables of stone? . . . For who would say

that it was no part of Christian observance that the one God should be served with religious obedience, and that an idol should not be worshipped, and that the name of the Lord should not be taken in vain, and that parents should be honoured, and that adulteries, murders, thefts, and acts of false witness should not be committed, and that neither the wife of another man, nor anything else which belongs to him, should be coveted? Who is so impious as to say that he does not keep those precepts of the Law because he is a Christian, and is established not under the Law, but under grace?"¹

Surely this eloquent passage from S. Augustine's treatise appeals to our hearts and consciences. And it is much to be observed that S. Augustine not only brings forward the Decalogue as being a part of the old law which is binding on Christians, but he refers to *all* the many precepts in that law which have to do with piety and good morals; and he selects one such precept from Lev. vi. as an illustration of what he means. The Decalogue has, no doubt, a *prominent* place in the moral law which is binding on Christians, as it had also among the Israelites; but the whole of the Mosaic Moral Law binds us, and not the Decalogue only.

Instead of quoting other passages from S. Augustine's works bearing on the point which we are considering, I will bring to your notice an admirable passage from Archbishop Trench's *Expo-*

¹ S. Augustine, *Contra Duas Epistolas Pelagianorum*, lib. iii. cap. iv. § 10, *Opp.* tom. x. pars prior, col. 594 (*al.* col. 453).

sition of the Sermon on the Mount drawn from the writings of S. Augustine, in which the Archbishop gathers up in a masterly manner S. Augustine's teaching concerning the true meaning of the words of our Lord recorded in S. Matt. v. 17, 18.

Dr. Trench begins his summary by saying : "To the question, all important for the right understanding of this discourse, and indeed of any true apprehension of the relation in which the newer legislation of Christ stood to the older of Moses, namely, in what way Christ was come, '*not to destroy the Law, but to fulfil,*' Augustine gives apparently many answers ; yet not in fact many, being all at the root but one." I have not space to transcribe the Archbishop's summary of S. Augustine's answers ; but I proceed at once to his summary of the teaching which is implied by the answers. He says : "By these answers it will at once be seen how little Augustine consents with them, Manichaeans of old, Quakers in modern times, who affirm that in the new legislation of Christ there is any abrogation of, or withdrawing, or casting a slight upon, any part of the old. He had on this matter the same conflict to maintain with the Manichaeans, which Irenaeus, Tertullian, and others in earlier times had maintained with the Gnostics. These, as those, eagerly snatched at such passages as Matt. v. 31, 32, 43, 44 ; they urged them as plain proofs that Christ had come, according to His own avowal, to repeal the Mosaic code ; they affirmed that whatever of that code He sanctioned and allowed to stand fast was not peculiar to Moses, but belonged to the universal morality,

while everything distinctive of Moses was by Him disallowed and cast aside. Now, Augustine, in reply to these enemies of the Old Testament, does not avail himself of the timid gloss of some modern commentators, and admit that there is such a repealing, but then plead that it is only the Pharisaical additions to the Law, or perversions of it, which thus are repealed. Rather, he denies the repealing altogether; and this verse, he affirms, gives us the key-note of the Sermon on the Mount—at least, to the end of its first chapter. He declares that in each case the old stands fast, however there may be a new unfolded from it.”¹

These citations prove, I think, that S. Augustine, following the teaching of our Lord and of S. Paul, maintains the perpetuity of the authority of the Mosaic Moral Law as it was completed by Christ, and by Him constituted to be an inspired guide of a Christian man's obedience.

Now I pass from the Fathers to the Schoolmen, and I shall take, as their representative, the Angel of the Schools, S. Thomas Aquinas.

That great writer, in his *Exposition of the Epistle to the Ephesians*, is commenting on S. Paul's words: “For He is our peace, who made both one, and brake down (λύσας: Vulg. *solvens*) the middle wall of partition, having abolished in His flesh the enmity, even the law of commandments contained in ordinances; that He might create in Himself of the twain one new man, so making peace.”² And

¹ Archbishop Trench, *Exposition of the Sermon on the Mount*, edit. 1869, pp. 179–182.

² Eph. ii. 14, 15.

he says: "But here a question may be raised, because he says, 'breaking down the middle wall of partition'; while the contrary is said in S. Matt. v.: 'I came not to destroy (*καταλῦσαι*: Vulg. *solvere*) the Law, but to complete it.' I answer that one ought to say that there were in the old Law moral precepts and ceremonial precepts. As for the moral precepts, Christ did not destroy them, but completed them, by adding to them the counsels, and by explaining those things which the Scribes and Pharisees used to understand wrongly. Wherefore He said, 'Except your righteousness shall exceed the righteousness of the scribes and Pharisees,' &c. And again: 'It was said to them of old time, Thou shalt love thy neighbour and hate thine enemy: but I say unto you, Love your enemies,' &c. But as for the ceremonial precepts, He destroyed them as regards their substance, but He completed (or fulfilled) them as regards that which they typified, providing an antitype for the type."¹

In this passage S. Thomas, like Tertullian and S. Augustine and the Fathers generally, explains our Lord's words in the Sermon on the Mount, and S. Paul's words in Eph. ii. 14, 15, by drawing the distinction between moral precepts and ceremonial precepts. The moral precepts were not destroyed by Christ; but the ceremonial precepts, as precepts, were destroyed, though from another point of view they were fulfilled, the antitype fulfilling the type.

In the *Summa Theologica* S. Thomas has a passage

¹ S. Thom., *Exposit. super Epist. ad Ephes.*, cap. ii. lect. v.

bearing on this subject, which it may be well to quote. He is discussing the question whether the ceremonies of the old Law came to an end at Christ's first coming. According to his custom, he first states the argument which he is going to refute, and he words this argument thus: "It seems that the ceremonies of the old Law did not come to an end at Christ's First Coming. For it is said in Baruch iv. 1, 'This is the book of the commandments of God, and the Law that endureth for ever.' But the ceremonies of the Law appertained to the Law. Therefore the ceremonies of the Law were to endure for ever." To this S. Thomas thus makes answer: "We must hold that the old Law endureth for ever, simply and absolutely, so far as regards its moral sections; but, so far as regards its ceremonial sections, it endureth for ever only because of the truth which is typified by the ceremonies prescribed."¹

Having thus discussed in a summary way the teaching of Holy Scripture and of the Fathers and of the Schoolmen, we shall, I hope, be better able to perceive how thoroughly scriptural and catholic is the position taken up by the Church of England in her seventh Article of Religion. The Church in that Article makes the following admirable statement: "Although the Law given from God by Moses, as touching Ceremonies and Rites, do not bind Christian men, nor the Civil precepts thereof ought of necessity to be received in any commonwealth; yet notwithstanding, no Christian man

¹ S. Thom., *Summ. Theol.*, 1^{ma} 2^{dæ}, qu. ciii. art. iii. ad 1^{um}.

whatsoever is free from the obedience of the Commandments which are called moral."

It is a pleasure to be able to quote the Westminster Confession, which is the principal doctrinal formulary of the Scotch Presbyterians, as being in complete agreement with our Article in regard to the main point expressed in that portion of it which has been quoted above. In the fifth paragraph of the nineteenth Article of the Westminster Confession the following statement occurs :—"The Moral Law doth for ever bind all, as well justified persons as others, to the obedience thereof : and that, not only in regard of the matter contained in it, but also in respect of the authority of God the Creator, who gave it. Neither doth Christ in the Gospel in any way dissolve, but much strengthen this obligation."

But perhaps some of my readers may be inclined to intervene at this point with some such questions as the following : Is not all this train of argumentation very old-fashioned ? Have not Graf and Wellhausen and their followers shown to demonstration that the Mosaic legislation belongs to an age or to various ages long posterior to the time of Moses ?

In reply to questions such as these, I would say first, that, since the time when I first began to study theology, I have seen the rise and fall of not a few revolutionary theories about the dates of the several books whether of the Old or of the New Testament. For a time the inventors and supporters of such theories are apt to be very

dogmatic in their assertions, and very contemptuous in their attitude towards those who express doubts as to whether their new theories have a really solid foundation. But, if one waits for a few years, it not infrequently happens that these revolutionary theories gradually wither away and die, and men wonder that they could ever have had the vogue which they did have. I am not at all certain that something like this will not be the fate of the theories associated with the names of Graf and Wellhausen. But, for the sake of argument, let us assume that these theories will stand, and will win universal acceptance from all competent scholars. Let us assume in particular that it will be finally decided that the laws about the prohibited degrees of kindred and affinity, which are recorded in the books of Leviticus and Deuteronomy, were revealed, not in the time of Moses, but several centuries later than Moses. Well, what then? Neither Christians nor Jews have ever held the theory that God's revelations were limited to the time of Moses. Most of the inspired Scriptures of the Old Testament were written long after the time of Moses; some probably as late as the time of the Maccabees; and there is no sort of doubt that the laws about the prohibited degrees formed part of the sacred Law, accepted by the Jewish people as the divinely revealed Law of God, in the time of our Lord Jesus Christ. These laws formed part of *that* Law concerning which our Divine Saviour said, "Think not that I am come to destroy the Law. . . . I am not come to destroy, but to complete. For

verily I say unto you, Till heaven and earth pass away, one jot or one tittle shall in no wise pass from the Law, till all things be accomplished." We Christians accept the Moral Law of the Old Testament on the authority of Christ. It is a matter of complete indifference to us *who* in the Old Testament times was the inspired channel of God's revelation of this or that particular law to the Israelite nation. It follows, from what has been said, that the theories of Graf and Wellhausen, whatever be their final lot, whether of acceptance or of rejection, have no bearing on the argument of this treatise.¹

¹ Compare the remarks of the Dean of Christ Church (Dr. T. B. Strong), in his article on "Ethics" in Hastings's *Dictionary of the Bible* (vol. i. p. 788), and also the somewhat similar remarks of the Principal of King's College, London (Dr. A. C. Headlam), in his Inaugural Lecture on the "Sources and Authority of Dogmatic Theology," republished in his book, *History, Authority, and Theology*, p. 63.

CHAPTER III

THE OLD TESTAMENT CODE OF PROHIBITED
DEGREES

AND now, having prepared the way for an appeal to the Old Testament, I invite the reader to follow me, while I investigate the witness which it has to give in regard to the revealed will of God concerning the prohibited degrees of kindred and affinity.

The most complete summary of the moral laws concerning prohibited degrees, to be found in the Bible, is contained in the eighteenth chapter of the Book of Leviticus. That chapter begins with a hortatory introduction to the code of matrimonial laws, which runs thus : "And the Lord spake unto Moses, saying, Speak unto the Children of Israel, and say unto them, I am the Lord your God. After the doings of the land of Egypt, wherein ye dwelt, shall ye not do : and after the doings of the land of Canaan, whither I bring you, shall ye not do : neither shall ye walk in their statutes. My judgements shall ye do, and My statutes shall ye keep, to walk therein : I am the Lord your God. Ye shall therefore keep My statutes and My judgements : which if a man do, he shall live in them : I am the Lord." ¹

¹ Lev. xviii. 1-5.

In this introduction God draws a pointed contrast between the matrimonial laws revealed by Him to Israel, which immediately follow, and the customs and statutes of the Egyptians and Canaanites which were hateful to Him. This contrast is brought out still more strongly at the end of the chapter in the hortatory conclusion, which follows both the code of matrimonial laws and the six additional laws constituting what may be called an appendix to the code. But of that hortatory conclusion I shall have something to say later.

Now we come to the matrimonial code itself, which begins by laying down the statement of a general principle, and then goes on to show how far that principle extends, and to give leading examples of its application.

The general principle is enunciated in the sixth verse of the chapter, and runs thus : "None of you shall approach to any that is near of kin to him, to uncover their nakedness. I am the Lord." In the original Hebrew the words are still more expressive. The passage may be translated literally thus : "None of you shall approach to the flesh of his body." In the garden of Eden Adam said of Eve : "This is now bone of my bones and flesh of my flesh," and God immediately afterwards said concerning husbands and wives in general : "Therefore shall a man . . . cleave unto his wife : and they shall be one flesh." It follows that the general principle laid down in Lev. xviii. 6 covers all near relationships whether by consanguinity or by affinity. And we are therefore not surprised to find that in the

leading examples which follow, out of fourteen examples, six are cases of consanguinity, and eight are cases of affinity.

If we only had the general principle, laid down in the sixth verse, to guide us, it would be difficult to know with certainty how to apply it. A man is forbidden to "approach to any that is near of kin to him." But the word "near" is a relative term, and the question would arise: How far does nearness of kin extend? Accordingly in verses 7 to 17 inclusive, fourteen examples are given, some of consanguinity and some of affinity; and under each of these two categories there are examples of relationship in the first degree, and in the second degree, and in the third degree; but under neither category is there any example of relationship in the fourth degree. We learn, therefore, from these examples that the nearness of relationship, which, according to this code, constitutes a bar to marriage, extends both in consanguinity and in affinity as far as the third degree inclusive, but no further. For example, first cousins, who are related to each other in the fourth degree, are not forbidden by the Divine law to marry.

According to the code, a man is explicitly forbidden to marry his mother, and his step-mother, his half-sister, his grand-daughter, his aunt, his uncle's wife, his daughter-in law, his brother's wife—that is to say his sister-in-law, his step-daughter, his mother-in-law, and his step-grand-daughter.

On the face of it the code is not exhaustive. It

is worded all through from the man's point of view, and not from the woman's point of view. For example, the man is forbidden to marry his mother ; but he is not expressly forbidden to marry his daughter. It is assumed that the student of the code will have sufficient common sense to be able to draw the conclusion that, if a man may not marry his mother, then, of course, a woman may not marry her father, which is the same thing as saying that a man may not marry his daughter. Similarly, a man is forbidden to marry his grand-daughter, but he is not forbidden to marry his grandmother. That follows as a necessary consequence ; because, if a man may not marry his grand-daughter, then obviously a woman may not marry her grandson. Similarly a man is forbidden to marry his aunt, then it follows that a woman may not marry her uncle, or, in other words, a man may not marry his niece. This principle runs through the whole code. Certain representative or leading cases are given, and you are expected to have sense enough to draw the necessary conclusions.

It is important to call special attention to verse 16. In that verse a man is forbidden to marry his brother's¹ wife, who is, of course, his sister-in-law.

¹ Of course the terms "brother" and "sister" include respectively those whom we should call "half-brother" and "half-sister" (see Levit. xviii. 9). So S. John Baptist rebuked Antipas for marrying Herodias, the wife of his half-brother, Philip. And so Archbishop Parker, when in 1563 he authoritatively promulgated the well-known Table of Kindred and Affinity, embodied it in an explanatory Admonition, in the course of which he says: "It is also to be noted that consanguinity and affinity (letting and dissolving matrimony) is contracted as well in them and by them, which be of kindred by the

In other words, a woman is forbidden to marry two brothers in succession. Of course it follows that a man may not marry two sisters in succession. A man may therefore not marry his deceased wife's sister. She is also his sister-in-law. It would be indeed astounding if he might marry his sister-in-law. The code forbids him to marry a relation by affinity much further away from him than a sister-in-law.¹ He is forbidden to marry his aunt-in-law, I mean his uncle's wife; and it necessarily follows that he is forbidden to marry his niece-in-law, that is, his nephew's wife. Aunts and nieces are much more distant relations than sisters; and, therefore, if a man is forbidden to marry his aunt-in-law and his niece-in-law, how can it possibly be lawful for him to marry his sister-in-law? The fact is, that a brother-in-law is related to his sister-in-law by affinity in the second degree; and affinity in the second degree occupies a middle position in the code. The prohibited relationships in the first degree are nearer relationships; and the prohibited relationships in the third degree are more distant relationships.² It is most astonishing

one side, as in and by them which be of kindred by both sides" (Cardwell's *Documentary Annals of the Reformed Church of England*, edit. 1844, vol. i. p. 318).

¹ Long ago S. Ambrose pointed out in his letter to Paternus (*P. L.* xvi. 1185) that, if a more distant relationship constitutes by Divine Law an impediment to marriage, *a fortiori* a nearer relationship, even though not expressly mentioned in Scripture, must be regarded as an impediment recognized as such by the Law of God and therefore by Himself, as the author of that Law: "Qui enim leviora astringit, graviora non solvit sed alligat."

² The force of these considerations will be felt all the more strongly, if it is remembered that all through the code in Lev. xviii. nearness of relationship is set forth as the ground of the prohibition to marry (see Lev. xviii. 6, 12, 13, 14, 17).

that Parliament should have picked out a particular relationship, occupying a middle place in the Divine Code, and in the Table founded on that Code, and should have legalized marriage between parties related to each other in that particular way, while leaving the rest of the Code and the Table untouched. From a religious and social point of view the action of Parliament is disastrous, and logically it is absurd.¹

I have now, I think, explained the scriptural law about impediments to marriage, arising out of near relationship, whether of consanguinity or of affinity.

There follow six other moral laws, on which I need not comment; except in the case of one of them, which is a special limitation of the general permission to marry more wives than one, conceded to the Israelites and to other nations, before Christ came, on account of the hardness of their hearts. Of course, for us Christians, polygamy is absolutely unlawful; and therefore the law, laying down a particular limitation in a special case of polygamy, is not a law which has any bearing on our life.

The reader will remember that in the ancient patriarchal times, long before the Law was given to the chosen people, the patriarch, Jacob, or Israel, who gave his name to his descendants, the children of Israel, was fraudulently treated by his relative,

¹ The Lady Margaret Professor of Divinity at Cambridge, Dr. Inge, now Dean of St. Paul's, writing on Jan. 23, 1910, to the Archbishop of Canterbury about certain judgements delivered at the hearing of an appeal connected with the case of *Banister and Wife v. Thompson*, speaks of the Law, as at present declared in that case, as introducing "an anomalous and *irrational* exception into the Table of Affinity" (*Morning Post*, February 8, 1910, p. 4, col. 4).

Laban. He had worked seven years for Laban's youngest daughter, Rachel, and, when the nuptial night arrived, Laban fraudulently substituted his eldest daughter, Leah, in place of Rachel. "And it came to pass in the morning that behold it was Leah. And Jacob said to Laban, 'What is this that thou has done unto me? did not I serve with thee for Rachel? wherefore, then, hast thou beguiled me?' And Laban said, 'It is not so done in our place, to give the younger before the first-born.'" Finally, Jacob agreed to work for seven more years for Rachel; and then he married as his second wife the sister of his first wife.¹

It seems that the Israelites, in their reverence for their great ancestor Jacob, thought that whatever he did must be allowable for them. God therefore inserted,² among the laws of the eighteenth chapter of Leviticus a special law prohibiting this mistaken imitation of the patriarch. The law ran thus: "*And thou shalt not take a woman to her sister to be a rival to her (or to vex her), to uncover her nakedness during her lifetime.*"³ All polygamous marriages have a tendency to create bitter rivalry and vexation to the first wife during the whole of the remainder of her lifetime. It is not a passing vexation—it is a permanent one. But for two blood-sisters to be

¹ Gen. xxix. 25, 26.

² In the East S. Basil (*Ep. clx. ad Diodorum*, § 3, *P. G.*, xxxii. 625) expresses the opinion that this particular prohibition was inserted because Jacob's example might do harm; and in the West S. Augustine (*Quaestiones in Heptateuchum*, lib. iii. qu. lxiv., *Opp.* tom. iii. part. i. col. 518) points out that the purport of this eighteenth verse is to prohibit that form of polygamy which Jacob had practised.

³ Lev. xviii. 18.

put into a position of permanent rivalry is especially obnoxious, because on account of their close blood-relationship they ought to have tender feelings of love the one for the other. Polygamous marriage with two sisters is therefore explicitly prohibited to prevent this life-long state of bitterness. This law was a moral law ; but it had reference to a state of things which has now happily passed away. The idea maintained by the Talmudists (see pp. 47, 48, below) that the law implies, in opposition to the whole principle of the code which immediately precedes it, that the man might marry his first wife's sister after the death of his first wife, seems very far-fetched and quite inadmissible.¹

If any one is prepared to uphold the view that the passage, rightly interpreted, does sustain the inference which the Talmudists drew from it, notwithstanding the fact that such an inference contradicts the whole principle and scope of the preceding code, I should be ready to say :—Well ! for the sake of argument let us suppose that such an inference is correct. In that case one must regard the inferred permission as having been granted by

¹ Bishop Patrick, commenting on Lev. xviii. 18, says: "From hence some infer that a man was permitted to marry the sister of his former wife when she was dead. So the Talmudists; but the Karaites thought it absolutely unlawful, as Mr. Selden observes (*De Uxore Hebr.*, lib. i. cap. 4). For it is directly against the scope of all these laws, which prohibit men to marry at all with such persons as are here mentioned, either in their wives' lifetime or after. And there being a prohibition (v. 16) to marry a brother's wife, it is unreasonable to think Moses gave them leave to marry their wife's sister. These words, therefore, 'in her life-time,' are to be referred, not to the first words, 'neither shalt thou take,' but to the next 'to vex her,' as long as she lives" (see a *Critical Commentary and Paraphrase on the Old and New Testament and the Apocrypha*, by Patrick, Lowth, Arnald, Whitby, and Lowman, edit. 1853, vol. i. p. 491).

way of dispensation to the Israelites, "for the hardness of their hearts." It must be put on a line with the permission to practise polygamy and divorce, and on a line also with the law of the levirate about which I shall have more to say later (see below, on pp. 45-47). But Christ revived for His Church in all its purity and strictness the great principle laid down in "the beginning," that husband and wife "are no more twain, but one flesh" (S. Matt. xix. 6) ; and He gives to us His Holy Spirit to enable us to carry out that principle in its integrity. We in the Church have no right to plead the excuse of "the hardness of our hearts." All these permissions, whether of polygamy, or of divorce, or of the levirate custom, or, if you will have it so, of marriage with a deceased wife's sister, are now obsolete, and have no more to do with us Christians than the laws for the celebration of the new moons or of the feast of trumpets.¹

In this eighteenth chapter of Leviticus, after the code of laws concerning the prohibited degrees of

¹ Persons who defend the permissibility of contracting marriage with the sister of one's deceased wife, seem often to write as if their opponents based their whole case on Lev. xviii. 18. That such a complete misconception should ever find acceptance with any one who has studied the controversy is most astonishing. I will not say that no instances exist which might be brought forward in defence of the view which I have indicated, because it is rash to commit oneself to a universal negative. But I will say that I know of no such instances. Normally, Lev. xviii. 18 is regarded as the difficulty or obstacle which has to be removed, not as the foundation on which the structure has to be built. We do indeed think that the difficulty can be honestly and satisfactorily explained ; but we admit that *prima facie* it constitutes a difficulty. Our New Testament basis is to be found in our Lord's words recorded in S. Matt. v. 17, 18, and our Old Testament basis is to be found in Lev. xviii. 6, as interpreted by the principles involved in the eleven verses which follow, and very specially in Lev. xviii. 16.

consanguinity and affinity and the six miscellaneous laws which form an appendix to the code, there follows a hortatory conclusion which brings the chapter to an end. And this hortatory conclusion shows to demonstration that the laws both of the code and of its appendix were not municipal laws for the one little nation of the Israelites, but were laws of binding morality affecting other nations, and were, as would seem probable, a republication of laws revealed to mankind in some earlier stage of their development, but afterwards more and more obscured and forgotten through the corruption into which the whole human race sank ever deeper and deeper. It is God Himself who speaks in this hortatory conclusion, and He says : "Defile not ye yourselves in *any* of these things ; for in *all* these the nations are defiled which I cast out from before you : and the land is defiled : therefore I do visit the iniquity thereof upon it, and the land vomiteth out her inhabitants. Ye therefore shall keep My statutes and My judgements, and shall not do any of these abominations : neither the home-born nor the stranger that sojourneth among you : (for *all* these abominations have the men of the land done, which were before you, and the land is defiled) : that the land vomit not you out also, when ye defile it, as it vomited out the nation that was before you. For whosoever shall do *any* of these abominations, even the souls that do them, shall be cut off from among their people. Therefore shall ye keep My charge, that ye do not *any* of these abominable customs, which were done before you, and that ye

defile not yourselves therein : I am the Lord your God."¹

As I have already indicated, the matrimonial code and its appendix are, as it were, wedged in between a hortatory introduction at the beginning of the chapter and this hortatory conclusion at its close. The denunciations of the conclusion against those who "shall do *any* of these abominations" evidently refer to those who break any of the laws contained in the chapter, that is to say, any of the laws against incest in the code, and any of the miscellaneous laws in the appendix. The breach of any of these laws, including the law forbidding brothers-in-law to marry their sisters-in-law, is described as an abomination which caused the land of Canaan to vomit out the nations that occupied it before its conquest by Israel, and which would cause Israel to be vomited out, if it fell into any of the same loathsome sins.² And the whole concludes by God's solemn asseveration, "I am the Lord your God," thus setting His seal to the

¹ Lev. xviii. 24-30.

² Some writers have tried to limit the reference of these denunciations to the violators of any of the six prohibitions contained in what I have called the appendix to the matrimonial code (Lev. xviii. 18-23), on the ground that it is these six laws which immediately precede the hortatory conclusion of the chapter. The object of these writers is evidently to shield persons who break the laws against incest contained in the matrimonial code (Lev. xviii. 6-17) from being supposed to incur the indignation of God which is expressed in the hortatory conclusion. But it is plain that the chapter must be taken as one whole, and both the hortatory introduction and the hortatory conclusion must be regarded as referring to those who break any of the laws contained in the chapter, whether they find a place in the code or in the appendix. Moreover, there are similar denunciations in Lev. xx. 22, 23; and the laws immediately preceding those denunciations are laws against incest, the last of them being a law against a man marrying his sister-in-law (Lev. xx. 21).

intensity of His holy indignation against those who do such things, and the awful certainty of the punishment which would follow their commission.

It is too dreadful to think that there are persons who are desirous that the clergy of our Church should be instructed to give the Holy Communion of the Body and Blood of our Lord to baptized and confirmed Christians who are wallowing in some of these abominations, abominations which, even when committed by the poor ignorant Hivites and Perizzites and Girgashites, were so hateful to God that He doomed those nations to extermination, and the land which they defiled vomited them out.

I have heard of people trying to refute this plain teaching of Holy Scripture by referring to the Deuteronomic law of the levirate. In Deut. xxv. 5-11 it is laid down that "If brethren live together, and one of them die, and have no son, the wife of the dead shall not marry without unto a stranger : her husband's brother shall go in unto her, and take her to him to wife, and perform the duty of an husband's brother unto her. And it shall be that the first-born which she beareth shall succeed in the name of his brother which is dead, that his name be not blotted out of Israel." Now, it is obvious that this levirate law contemplated what was altogether an abnormal and special case. It only took effect when the two brothers had been dwelling together on the same estate, and one of them died without male issue. This law was not revealed to Moses, or invented by him ; it

existed in Israel long before his time, as appears from the history of Tamar in the Book of Genesis ;¹ and it was very widely spread throughout the world, as, for example, among certain races in India, Persia, Africa, and Italy. It exists even now among the Zulus, the Arabians, the Druses, and the tribes of the Caucasus. Moses, therefore, did not originate it. He continued it in a modified form, taking away from it its compulsory character. Under the guidance of God, he suffered it for the hardness of men's hearts, just as he suffered polygamy and divorce. In all these three matters there was what may be called a Divine dispensation from a Divine law.²

And it must further be observed that while the Divine law prohibiting brothers-in-law and sisters-in-law to marry, is a *moral* law based on the divinely revealed principle of the unity of husband and wife, the dispensation contained in the law of the levirate has for its object the keeping up of the family of the deceased brother, "that his name be not put out of Israel," and that the land allotted to him

¹ Gen. xxxviii. 8, 9.

² The great mediaeval theologian, S. Antoninus, Archbishop of Florence (A.D. 1446-1459) in his *Summa Theologica* (pars iii^a, tit. i. cap. xi. *de affinitate*, edit. Veron., 1740, tom. iii. col. 42), says : "Nec etiam posset dispensare papa in uxore fratris mortui sine liberis ; quia licet olim liceret ; tamen dispensative licebat, quae dispensatio fiebat jure divino, non ab homine ; nam jure divino communiter abstinerebatur ab uxore fratris, sicut a sorore : sed in casu illo permittebatur." He goes on to compare the case of polygamy which was allowed by Divine dispensation under the old law, but is strictly prohibited now, so that, as all would admit, it would be impossible for the Pope to allow polygamy by dispensation. In all this discussion S. Antoninus is quoting and adopting the reasonings and conclusions of Petrus de Palude.

pass not into the hand of strangers. The law which embodies the dispensation is therefore not a moral law, but a civil or municipal law, which bound the Israelite people when they lived as a nation in their own land, but which has no binding force on Christians,¹ and is, in fact, irreconcilable with the Christian principle of monogamy.² The dispensation is therefore now obsolete. It is a dead thing.³ But the law prohibiting a man from marrying his sister-in-law is in full force. It is part of that Divine Moral Law, which Christ came not to destroy, but to complete. It is evident, therefore, that the levirate law cannot be brought forward as an excuse for marriage with a brother's widow, and still less can it be brought forward as an excuse for permitting marriage with a deceased wife's sister, with which it has really nothing whatever to do.

In the eighth century of the Christian era a

¹ It may seem incredible, but I have more than once come across people who thought that the incident recorded in S. Matt. xxii. 23-32, and in the parallel passages in the two other synoptic Gospels, proves that our Lord sanctions for Christians marriage with a deceased wife's sister. But the seven brethren who, each in turn, married the same woman were acting under the Jewish law of the levirate, and the people who told the story to our Lord were Sadducees. Such marriages were lawful for them; but, for the reasons set forth in the text, they are wholly unlawful for us Christians.

² Normally the brother would, at the time of the husband's death, be already a married man; nevertheless the law required him to marry as an additional wife his brother's widow.

³ S. Augustine, in his *Speculum* (see below, on pp. 71-73), omits from his extracts from Deuteronomy the whole of the section in Deut. xxv. which deals with the law of the levirate. This shows that, in S. Augustine's opinion, that law is not a moral law, and does not bind Christians. Tertullian, in his *De Monogamia* (cap. vii.), declares that, since the reason for the law of the levirate has ceased, we may conclude that that law is "ex eis quae evacuata sunt legis."

dispute broke out among the Jews of Mesopotamia between the Karaites or *Scripturarii* and the Rabbinites or *Talmudici*. The Karaites claimed to be distinguished by their adherence to Scripture as contrasted with the oral traditions of the Rabbis enshrined in the Talmud. Among other points of difference, the Karaites, adhering to Scripture, forbade a man to marry his deceased wife's sister; while the *Talmudici*, following the lax moral traditions of many of the Rabbis, allowed incestuous marriages of that kind. The Rabbis, or at any rate many of them, were accustomed to take up a very rigoristic line in regard to ceremonial matters, while in regard to the moral law they often explained away its holy strictness by sophistical explanations and quibbles. Our Lord, as we learn from the Gospels, had very frequently to reprove with sternness both the ceremonial rigorism and the moral laxity of the Jewish teachers of His day. What the authorized teaching of the scribes and Pharisees in the time of our Lord was, in regard to the prohibited degrees, is not, I think, known;¹ and, if it was known, it would not very much matter. The principle laid down by our Saviour for His followers was that, "Except your righteousness shall exceed the righteousness of the scribes and Pharisees,

¹ It would seem, however, from a passage in Philo (*De Specialibus Legibus, quae referuntur ad praeceptum vi. et vii.*, edit. Cohn-Wendland, v. 157 et Mangey ii. 304) that in our Lord's time the Jews of Alexandria, or some of them, were already interpreting Lev. xviii. 18 in the way that was afterwards followed by the *Talmudici*. The text of the passage seems to need emendation, but the conclusion stated above necessarily results from the context. See a discussion of this point by Dr. Lock in *J.T.S.* ix. 300, 301.

ye shall in no wise enter into the kingdom of heaven." ¹ And it was in order that we might be able to attain to that higher standard, that the Son of God became Incarnate, and died on the Cross, and rose again, and finally poured down His Holy Spirit into His Church and into the hearts of the individual members of His Church.

And now, having investigated the teaching of the Holy Scriptures, both of the Old and New Testaments, on the subject of marriage with a deceased wife's sister, we must pass on to consider the teaching and practice of the Christian Church in regard to the same matter.

¹ S. Matt. v. 20.

CHAPTER IV

THE TEACHING AND PRACTICE OF THE CHURCH
IN REGARD TO MARRIAGE WITH A DECEASED
WIFE'S SISTER DURING THE FIRST FOUR
CENTURIES

THE starting-point of all consideration of the teaching of the Christian Church on moral questions is the undoubted fact that she inherited the Mosaic Moral Law, as that Law was completed by our Lord Jesus Christ. Christianity does not profess to be a new religion. It claims to be the old religion of Israel carried to perfection. Dr. Hort has a striking passage bearing on this fundamental point. He says : " One of the most serious dangers to Christian faith in the early ages, perhaps we may say in all ages, was the temptation to think of Christ as the founder of a *new* religion—to invert His words, 'I came not to destroy, but to fulfil.' S. Paul himself was entirely free from such a view of Christianity ; but the part which he had to take in vindicating Gentile freedom against Jewish encroachments made him easily appear to be the herald of a new religion. The Divine judgement of the fall of Jerusalem and the Jewish State, and also the bitter hatred with

which the Jews long pursued Christians, would all tend to produce the same impression. Thus many influences prepared the way for the influence of Marcion in the second century and long afterwards, and made him seem a true champion of the purity of the Gospel. . . . And so again and again the wild dream of a 'Christianity without Judaism' has risen up with attractive power. But the Epistle of S. James marks in the most decisive way the continuity of the two Testaments. . . . The Epistle of S. James looks upon the elder dispensation as having been in a manner itself brought to perfection by the Gospel."¹

And similarly, in his *Prolegomena to S. Paul's Epistles to the Romans and Ephesians* (p. 25), Hort says : "The last thing that S. Paul would ever have thought of saying of the Gospel was that it was a new religion. In his eyes, as with all the Apostles, it was the old religion of Israel carried to perfection, not a new faith superseding it ; and so the history and scriptures of Israel remained the heritage of those who received the new covenant."²

The Mosaic Moral Law was one of the elements of the old dispensation which was to continue under the new dispensation. Some things in the old dispensation were to drop off, having done their work : but the Moral Law was not one of these. S. Paul expresses the two sides of this truth when he says to the Corinthians : "Circumcision is nothing, and uncircumcision is nothing ; but the keeping of the

¹ Hort (*The Epistle of S. James*, Introduction, pp. x., xi.).

² Cf. Hort's *First Epistle of S. Peter*, p. 7.

commandments of God.”¹ And S. John emphasizes very strongly the second half of S. Paul’s assertion when he says : “ Hereby we perceive that we know Him, if we keep His commandments. He that saith, I know Him, and keepeth not His commandments, is a liar, and the truth is not in him.”²

Now, it is clear from S. Paul’s treatment of the incestuous Corinthian, that he regarded with horror the breach of God’s laws against incest, which that unfortunate man had committed. It is evident, therefore, that the Apostolic Church was in possession of rules defining what degrees of relationship were to be regarded as constituting a bar to marriage. And these rules evidently included near relationship by affinity, and therefore *à fortiori* near relationship by consanguinity. Moreover, it is clear that it was not merely the standard set up by the laws of the heathen Roman empire on the subject of incest that was in S. Paul’s mind when he dealt with the Corinthian. He refers to the fact that the unlawful marriage at Corinth was one which was not tolerated by the heathen, as an *aggravation* of the wickedness of the deed. He says : “ Actually, it is reported that there is unlawful marriage among you, and such unlawful marriage as is not even among the heathen.” The Church therefore had her own Table of Prohibited Degrees, which extended further than the analogous Table of the heathen empire. And what Table could that be, if it was not the Mosaic Table inherited by the Church from the Old

¹ 1 Cor. vii. 19.

² 1 S. John ii. 3, 4.

dispensation, as being part of the Moral Law revealed by God for all time? If any one denies this, let him give his reasons, and try and prove, if he can, that the Christian Church in early times had some Table of Prohibited Degrees, independent both of the Mosaic Table and of the Table sanctioned by the heathen empire. For myself, I am certain that this cannot be done.

Unfortunately, we have hardly any evidence bearing on this matter during the first three centuries of the Church's history.¹ But when evidence begins to be forthcoming, we find the Church enforcing the prohibitions of the Mosaic Code. And this fact seems to corroborate the conclusion at which we have already arrived, namely, that from the beginning the Church inherited that Code.

The only evidence bearing on this matter which I have noticed between the Apostolic age and the end of the third century, is a clause which occurs in the Septuagint reading of Deut. xxvii. 23 in the uncial Codex Vaticanus (B), a MS. which, speaking generally, contains the oldest and purest text.²

¹ But we have evidence that it was thought right that proposed marriages should be sanctioned by the Bishop before they were contracted (cf. S. Ignat., *Ep. ad Polycarp.*, cap. v.), in order that the marriage might be *κατὰ Κύριον* and not *κατ' ἐπιθυμίαν*.

² Dr. Swete (*Introduction to the Old Testament in Greek*, pp. 486, 487) says: "Cod. B, as was pointed out by Dr. Hort, 'on the whole presents the version of the Septuagint in its relatively oldest form.' . . . If we accept Dr. Hort's view, which at present [September 1900] holds the field, the Vatican MS. in the Old Testament as a whole carries us back to the third century text known to Origen, and possibly to one much earlier. In other words, not only is the Vatican MS. our oldest MS. of the Greek Bible, but it contains, speaking quite generally, the oldest text. But it would be an error to suppose that this is true in regard to every context or even every book." Dr. Driver (*Notes on the Hebrew Text of the Book of Samuel*, Introduction,

This same clause occurs also in some Septuagint cursives,¹ four of which are known to contain an ancient type of text, commonly called the Lucianic text. The same clause is also found in the Old Latin text of the Lyons Heptateuch,² the only Old Latin text of that part of Deuteronomy, which is known to exist; and it occurs also in Wilkins's edition of the Bohairic (Coptic) text. According to these authorities the clause in the passage in Deuteronomy, to which I am referring, reads thus: "Cursed is he that sleepeth with his wife's sister. And all the people shall say, Amen." The combination of the Vatican text and the so-called Lucianic text (as printed by Lagarde) in favour of this clause points to its being at least as old as the time of

p. 1.) says: "That of all MSS. of the Septuagint B (with which ~~it~~ frequently agrees) exhibits *relatively* the purest and most original Septuagintal text, is generally allowed."

¹ The Codex Chigianus (Holmes and Parsons, 19, Brooke and McLean, 5), Cod. Vaticanus 330 (H. and P. 108, B. and M. *b*), and Cod. Atheniens. Bibl. Nat. 44 (B. and M. *w*), with which Cod. Paris. Bibl. Nat. Reg. Gr. 6 (H. and P. 118) is very closely allied, are the main representatives of Ceriani's and Lagarde's Lucianic group. All four contain the clause referred to in the text. It is also found in Cod. Paris. Bibl. Nat. Reg. Gr. 17^a (H. and P. 53; B. and M. *f*) and in Cod. Paris. Bibl. Nat. Reg. Gr. 3 (H. and P. 56; B. and M. *i*), which are both of them cursives, and are two out of three representatives of a group which has many distinctive features—partly in common with B. The combination of these noteworthy cursives with B and with Wilkins's Bohairic and the Old Latin versions is an unusual and a strong one. This note is largely based on information most kindly supplied to me, in answer to my questions, by Mr. N. McLean of Christ's College, Cambridge, one of the editors of the new Cambridge edition of the LXX. It should be noted that the two MSS. which are mentioned first in this note are so similar that they may almost be regarded as one witness; and in fact Messrs. Brooke and McLean only occasionally distinguish them, and normally use the symbol *b* to signify their concordant testimony.

² For the witness of quotations from the *Vetus Latina*, earlier than the date of the Lyons codex, in favour of the clause to which reference is made in the text, see note 1 on p. 68, below.

Origen, that is to say, the first half of the third century, and it *may* be much earlier¹; and it has even a chance of having formed part of the original text of the LXX translators, in which case it would have a pre-Christian origin. Even if it does not go back to a date earlier than Origen, it would show that either he or the copyists, who in his time introduced the clause into the text, regarded a man who married his wife's sister as an accursed criminal. I am not putting forward this ancient reading of the Septuagint translation of this verse in Deuteronomy as a proof that marriage with a wife's sister was prohibited by the Mosaic Law. The proof of that point rests on the matrimonial code in Leviticus. I am putting it forward as throwing some light on the way in which these marriages were regarded between the age of the Apostles and the end of the third century.

But perhaps a still more convincing proof of what the general feeling of the Christian Church during the age of persecution was, may be deduced from the fact that, soon after the conversion of

¹ I gather from Dr. Driver (*Notes on the Hebrew Text of the Books of Samuel*, Introduction, p. l. n. 1) that Ceriani, Hort, and Cornill hold that Cod. B exhibits one of the forms of the unrevised text of the LXX, as it stood before the textual labours of Origen. I of course express no opinion myself on this point. But I notice that Mez, in his *Die Bibel des Josephus* (p. 83), says: "There were two Greek Bibles before Origen, the text of B and its congeners probably native to Egypt, and a Syro-Italian Bible best preserved in the so-called Lucian text" (see the *Church Quarterly*, vol. li. pp. 384 and 394). If this be so, then the agreement of B with the Lucianic text and with such evidence as we have of the witness of the *Vetus Latina*, which in its original form came into existence in the second century or earlier, seems to point to that same second century as being probably the latest date that can be assigned to the clause which we are considering.

the empire to Christianity, an imperial law was promulgated prohibiting and annulling all marriages between brothers-in-law and their sisters-in-law. The Emperor Constantius, on the 30th of April 355 (or perhaps 357),¹ published a law in Rome, in which he says: "Although the ancients [that is to say, the old heathen Romans] believed that it was allowable for a man to marry his brother's wife, when his brother's marriage-union with that wife had been brought to an end, and although the ancients also believed that after the death or divorce of a man's wife it was allowable for him to contract marriage with his former wife's sister, let all men abstain for the future from such marriages, and let them not think that legitimate children can be begotten from unions of that sort, for it is fitting that those, who shall henceforth be thus born, shall be regarded as bastards."² I imagine that no competent scholar doubts that this great change in the law of the Empire was brought about by the pressure of Christian influence on the Emperor. It is important to notice that this law not only prohibits these marriages, but regards them as null and void. Children begotten from such unions are to be regarded as bastards. As the Bible treats these unions as abominable

¹ I suggest as possible the alternative date 357, because the law is dated from *Rome* on the 30th of April, and in 355 Constantius seems to have remained at Milan from January to June or July; whereas in 357 he was in Rome from the 28th of April to the 29th of May. If the real date is 357, there must be a mistake in the names of the consuls; but such mistakes are by no means infrequent in the Theodosian code.

² *Cod. Theod.* iii. xii. 2, ed. Mommsen, Berolin., 1905, vol. i. part. poster. pp. 150, 151.

and incestuous, Christians no doubt refused to recognize them as being in any sense "marriages," and the law of Constantius gives expression to the Christian feeling about the matter. In the matrimonial code of the eighteenth chapter of the Book of Leviticus, there is no trace of any intention to create two classes of impediments arising out of kinship and affinity. It is not suggested that marriage within *some* of the prohibited degrees is merely prohibited, while marriage within *others* of the prohibited degrees is not only prohibited, but also null from the beginning. All marriages within the degrees enumerated are treated in the same way. Marriage with a sister-in-law is treated in the same way as marriage with a man's own mother. Of course, the latter is more revolting ; but the law does not distinguish between them. If marriage with a mother was null and void, as of course it was, then marriage with a sister-in-law was also null and void. And this, which was the Christian view of the matter, was also the view taken by the Civil Law of England from the first evangelization of our country until three years ago.¹

That the law promulgated by Constantius was enacted by him under the pressure of Christian in-

¹ Lord Hatherley, Lord High Chancellor of England, in a letter to Dean Trench of Westminster (afterwards Archbishop of Dublin), originally published in 1861, but afterwards republished in 1869, says: "The Law of England, both ecclesiastical and civil, has from the first constitution of our monarchy treated marriage with a wife's sister as an incestuous marriage, and has never down to the present day made any distinction whatever between such a marriage and a marriage with a man's own sister or mother" (*A Vindication of the Law prohibiting Marriage with a Deceased Wife's Sister*, edit. 1869, p. 6).

fluence becomes perfectly clear when the writings of the Fathers and the ecclesiastical canons, both in the East and in the West, belonging to the fourth century, are studied. I will take the East first.

A Council was held at Neo-Caesarea in Pontus in the year 315, at least forty years before the edict of Constantius, and therefore at a time when the laws of the Empire enacted in heathen times still allowed and recognized these marriages. The Council in its second canon decreed as follows: "If a woman should marry two brothers [in succession], let her be excluded from Communion until death. Only in the article of death, if she says that, should she recover, she will break off her marriage, she shall, for the sake of humanity, be admitted to penance. But if either the woman or the man should die, while still continuing in such a marriage, the penance for the survivor shall be severe."¹ Here we have a marriage which the State recognized as legal, but which the Church regarded as incestuous, and therefore as null and void; and the Church, in fulfilment of her duty to God, to herself, and to the wicked pair, refuses to admit to penance one of the parties to this union, who is in imminent danger of death, unless she promises that, if she recovers, she will divorce the partner of her crime.

Sixty years after the Council of Neo-Caesarea, in 374 and 375, S. Basil the Great, who was then Metropolitan of Caesarea in Cappadocia, wrote his

¹ Mansi, *Concilia*, ii. 539.

three Canonical Epistles to his friend, S. Amphilochius of Iconium, who had consulted him on a number of disciplinary points. These three epistles are described as "Canonical Epistles," because for 1200 years and more the Eastern Church has received the eighty-four paragraphs into which the three epistles are divided, and has ascribed to them the authority of canons. Now, in the 78th of these Basilian paragraphs or canons, S. Basil, who had in the previous canon laid down that an adulterer should do penance for seven years, goes on to say, "Let the same rule hold good in those who marry two sisters although at different times."¹ It will be noticed that this canon says nothing about any obligation being laid on the man, who had married his deceased wife's sister, to separate from his incestuous partner. But of course that is presupposed. All these canons about sins of the flesh presuppose repentance, which includes amendment of life, as the necessary preliminary, without which no one could be granted the great favour of being allowed to do penance. About a year before the first of these three letters to S. Amphilochius was written, S. Basil had written a letter to a certain Diodorus on the subject of the wickedness of a man who should unite himself in so-called marriage with his deceased wife's sister. And in that letter he says expressly: "If any one, overcome by impurity, falls into unlawful intercourse with two sisters, this is not to be looked upon as marriage,

¹ S. Basil, *Ep.* ccxvii., can. 78, *Opp.* edit. Ben., tom. iii. p. 329; or *P.G.*, xxxii. 805.

nor are they to be admitted at all into the assembly of the Church until they have separated from one another."¹ We happen to have in this letter S. Basil's explicit statement about the necessity of the incestuous parties separating from each other, before being admitted to do penance; but even if the letter to Diodorus had perished, there could have been no shadow of doubt that penance for a sin could not be granted until the sin had been broken off.² *Cela va sans dire*. The principle is a fundamental principle of the Christian religion, and is not peculiar to any particular penitential code. The details of such codes may vary, but the principle of amendment of life, as the prerequisite for any admission to penitential discipline, is not subject to variation.

In his letter to Diodorus, S. Basil lays stress on the fact that the Church's way of dealing with persons who have fallen into the grievous sin of intermarrying, although they were related as brother-in-law to sister-in-law, has been handed down to his time "by holy men." Some have imagined that he was speaking of some traditional discipline

¹ S. Basil, *Ep. clx.*, *Opp.* tom. iii. p. 249; or *P.G.*, xxxii. 624.

² Unless, indeed, the sin was of such a character that it came under the rule "*Fieri non debuit, factum valet*." Such cases are exceptional; and it must never be assumed that any particular class of sins comes under the exception, until adequate proof is forthcoming. There is not the slightest reason to think that the Church during the first fifteen centuries of her existence ever regarded marriages within the divinely prohibited degrees as being in any sense real marriages. They were in the sight of God and of the Church null and void from the beginning. As a matter of course, S. Basil in this letter to Diodorus says concerning marriage with a deceased wife's sister: "This is not to be looked upon as marriage."

peculiar to his own Church of Caesarea. But that is quite impossible. In the first place, as we shall see directly, these so-called marriages were regarded as unlawful at Rome and Alexandria and even in distant Spain. They were also in S. Basil's time regarded as null and void by the laws of the Empire. But secondly, it is almost certain that the Diodorus, to whom S. Basil was writing, was a well-known priest of Antioch. And if S. Basil had been speaking of a custom peculiar to his own Church of Caesarea, he could not have held it up as having "the force of law," when he was arguing with a priest of Antioch. The customs of Caesarea had no binding force at Antioch, unless they were also customs of the Catholic Church. When therefore S. Basil speaks in connexion with this matter of "our custom," he means "our *Christian* custom," and not in any exclusive sense "our *Caesarean* custom."

But S. Basil does not rest his case solely on the immemorial tradition of the Church, and on the sanctity of those who in past times have followed that tradition and handed it on to those who came after them. He finds another secure basis for it in the Divine law, as it is set forth for all time in the eighteenth chapter of the Book of Leviticus. He says: "I maintain that this point has not been left in silence, but that the lawgiver has made a distinct prohibition. The words, 'None of you shall approach to any one that is near of kin to him, to uncover their nakedness,'¹ embraces also

¹ Lev. xviii. 6.

this form of kinship; for what could be more akin to a man than his own wife, or rather than his own flesh? 'For they are no more twain, but one flesh.'¹ So, through the wife the sister is made akin to the husband. For as he shall not take his wife's mother,² nor yet his wife's daughter,³ because he may not take his own mother nor his own daughter,⁴ so he may not take his wife's sister, because he may not take his own sister."⁵ S. Basil's argument is based on the general principle of the Mosaic matrimonial code, as laid down in Lev. xviii. 6, and on the divinely revealed method of applying that principle, which is indicated in the leading examples set forth in Lev. xviii. 7 to 17 inclusive.

Let us now consider the practice of the great Church of Alexandria in regard to the matter which we are discussing. Six years after S. Basil wrote his letters to S. Amphilochius, that is to say, in 381, S. Timothy, who earlier in life had sat at the feet of S. Athanasius, became Archbishop and Pope of Alexandria, and he presided over the Church in that city for four years, until his death in 385. There are still extant certain canonical answers, that is, answers having the force of canons, given by him for the direction of his clergy in reply to questions

¹ S. Matt. xix. 6.

² Cf. Lev. xviii. 17.

³ *Ibid.*

⁴ The great S. Augustine argues in a similar way. He says (*Contra Faustum*, xxii. 61, *Opp.* ed. Ben., 1694, viii. 397):—"Si enim vir et uxor, sicut Dominus dicit, non jam duo, sed una caro sunt, non aliter nurus est deputanda, quam filia."—"For if, as the Lord says, man and wife are no more two, but one flesh, a daughter-in-law is to be accounted no otherwise than as a daughter."

⁵ *P.G.*, xxxii. 628.

put to him by them. In one of these questions S. Timothy is asked concerning a clergyman, who has been summoned to solemnize a marriage, and hears that the proposed marriage is an unlawful one, "as, for example, a marriage of a man with his aunt or with a deceased wife's sister," and S. Timothy is asked "whether the clergyman ought to solemnize the marriage or offer the Oblation at it." S. Timothy replies that, "if the proposed marriage is an unlawful marriage, the clergyman ought not to make himself a partner in another man's sin."¹ It is evident that the unlawfulness of marriage with a deceased wife's sister is assumed both by the clergy who asked the question and by the Archbishop who gave the answer.

What I have said will, I think, be sufficient to illustrate the practice of the Church in the East in regard to marriage with a deceased wife's sister during the fourth century,² both before and after the promulgation of Constantius's law.

¹ *P.G.*, tom. xxxiii. col. 1304.

² Appeal is sometimes made to the 19th (*al.* 18th) of the Apostolical Canons, as if it implied that, while a man who had married his wife's sister could not become a clerk, he could be a lay communicant. Dr. John Wordsworth, the late Bishop of Salisbury, has dealt with this matter in a very satisfactory way in his book entitled—*The Law of the Church as to the Marriage of a Man with his Deceased Wife's Sister* (pp. 16, 17), and I cannot do better than quote his words. He says: "In the so-called Apostolic Canons [can. 19 (*al.* 18)], which represent the customs of the Church of Antioch about A.D. 390, we only read, 'He that has married two sisters or a niece cannot be a clerk.' At first sight this looks as if the marriage with two sisters would be tolerated, if it were hereafter contracted by a layman. But this cannot be the case. For the marriage with a niece, which is put upon the same footing, had long been prohibited by the civil law [*viz.* in A.D. 342], and the prohibition was published in the East (Phœnicia). As this fact makes it impossible to believe that the Church of Antioch allowed a layman to marry his niece, so we cannot

Let us now consider the practice of the West.

The earliest Western evidence bearing on the subject of our discussion is to be found in the 61st canon of the Council of Elvira in Southern Spain. There were present at that Council about twenty Spanish Bishops; and a good number of Spanish Churches were represented at it by priests. It was essentially a Spanish Council. It probably held its sessions either in the autumn of 305 or in the autumn of the following year. At the time when it was held there was in Spain a lull in the Diocletianic persecution; but at least six or seven years had to elapse before Constantine was to give peace to the Church by the promulgation of the Edict of Milan. The 61st canon of the Council of Elvira runs thus: "If any one after his wife's death has married her sister, and she herself be a believer, it was resolved that they should be debarred from Communion for five years, unless perchance the urgency of sickness should necessitate a more speedy reconciliation." It is interesting to notice that S. Basil in his canons assigns the same length of penance for this particular kind of incest as he assigns for certain cases of adultery, namely, seven years. According to the canons of Elvira, the length of penance for marriage with a deceased

argue that it allowed such a man to marry two sisters. Probably the canon refers to cases where the marriages in question had been contracted in ignorance, or before the civil prohibition." So far Bishop Wordsworth. I may add that Constantius's law of the year 342 (*Cod. Theod.* iii. xii. 1) makes the marriage of a man to his niece a capital offence. It should be also noted that this canon is one of a group of canons (*viz.* the 14th to the 23rd inclusive), which deal exclusively with the conduct and discipline of the clergy.

wife's sister was five years, and five years was also the length of penance for certain forms of adultery.¹ In both codes, though the precise number of years of penance was not the same, yet the particular kind of incest which we are considering was in each case put on a line with the sin of adultery.

I have already pointed out that in S. Basil's canon there is no explicit statement that the parties must separate before they can be admitted to penance. But, as I have shown, that is presupposed; and so, no doubt, it is presupposed in the canon of Elvira.² The canon is of special interest because it was promulgated before the peace of the Church, and gives us a glimpse of the way in which this kind of incest was regarded, and of the way in which it was punished, during the ages of persecution.

The next piece of Western evidence that I shall adduce is of very great importance, because it proceeds from a Bishop of Rome, and the document³ containing it was addressed to the Bishops of Gaul. It appears that the Bishops of Gaul were divided among themselves in regard to certain

¹ See the 14th and 69th canons of Elvira.

² This position was traversed by Mr. C. H. Turner of Magdalen in an article which appeared in the *Church Quarterly Review* for October 1908 (vol. lxxvii. pp. 151-168). I have considered some of the arguments used in that article in Appendix I. (see below, pp. 145-172).

³ This document has in the past been known as the *Canones ad Gallos*, or as the *Canones Romanorum ad Gallos episcopos*, and has been wrongly attributed to a Roman Synod held under either Pope Innocent or Pope Siricius. Migne includes it in his *Patrol. Lat.* (tom. xiii. coll. 1181-1194).

points of discipline,¹ of which one was the question,—whether marriage with a deceased wife's sister was or was not permissible. Some of them, or perhaps all of them, agreed together to consult the Primatial See of the West, which was also the Apostolic See nearest to the provinces of Gaul; and a letter embodying a string of questions was sent from Gaul to Rome. I have no doubt that this letter arrived in Rome some time or other during the episcopate of Pope Damasus, that is to say, between October 366 and December 384. And it is Damasus's reply to the Bishops of Gaul which is the document that I am going to quote.² I gather from Damasus's reply that those Gallic Bishops, who imagined that it was lawful for a Christian to marry his deceased wife's sister, based their theory on what seemed to them the precedent of the law of the levirate as promulgated for the Israelites in the Book of Deuteronomy, and also on the fact that the Patriarch Jacob had married two sisters, Leah and Rachel. In the twelfth paragraph of his reply Pope Damasus formulates his answer to

¹ In § 2 of the document, the writer says to his correspondents: "Scimus, fratres karissimi, multos episcopos per diversas ecclesias ad famam pessimam nominis sui humanā præsumptione patrum traditionem mutare properasse atque per hanc causam in haeresis tenebras cecidisse, dum gloriam hominum delectantur potius quam Dei praemia habere perquirere."

² For the proof of this conclusion, see a "thèse présentée à la Faculté des Lettres de l'Université de Paris," by E. Ch. Babut, entitled *La plus Ancienne Décretale*, 1904, pp. 12–41. M. Babut, in the *Revue d'Histoire et de Littérature Religieuses* for Janvier-Février, 1911, tom. ii. (Nouvelle Série), p. 61, n. 3, gives A.D. 370 or thereabouts as the date of Damasus's reply. Tixeront (*Histoire des Dogmes*, ii. 327), regards Babut's conclusion as highly probable; and Turmel (*Histoire du Dogme de la Papauté*, p. 314) attributes the document, known in the past as the *Canones ad Gallos*, to Damasus.

the question of his correspondents which had to do with this particular matter. He says: "[In reply to your question] concerning a man who should take to wife the sister of his own wife, [I would point out that] it was written in the Law of the Old Testament that, for the purpose of raising up seed, a man ought to marry the wife of his dead brother, yet he ought to do this only in the case of his brother having left no male issue by that wife; for it was because of this last qualifying clause that John the Baptist stood up against Herod, and told him that it was not lawful for him to take to himself a wife by whom his brother had left sons. Yet it was on account of the power of begetting which is proper to the male sex, that the rule of the law ordered this raising up of seed to be undertaken by the man; but we nowhere read that this rule applied to women; yet some may perhaps have rashly inferred that it should be so applied. For it may be because a rash inference of that sort was drawn that the Law says: ¹ 'Cursed is he that shall sleep with the sister of his wife.' " ² I have quoted in a somewhat paraphrastic way all that part of Damasus's answer which has any bearing on the perpetuity of the Mosaic Moral Law. The rest of the paragraph deals with the Patriarch Jacob's polygamy, and points out that such a mode of life is unlawful for Christians.

It is clear that, when this reply was written by Pope Damasus, marriage with a deceased wife's

¹ Deut. xxvii. 23 (Vet. Lat.).

² Babut, *La plus Ancienne Décrétale*, § 12, p. 80.

sister was regarded by the Church of Rome as unlawful. And, as the settling of the dispute, which had arisen in Gaul, had been referred to the arbitration of the Roman Bishop, it may be presumed that his decision was accepted by the Gallic Episcopate, and acted upon. Certainly there is no trace in history of the dispute having continued. It is interesting to notice that Damasus quotes Deut. xxvii. 23, according to a reading which substantially agrees with the Old Latin text of the Lyons Heptateuch,¹ and which reproduces the sense of the reading found in the Vatican and Lucianic texts of the Septuagint (see above, p. 54, n. 1).

I hope that it will be admitted that I have proved my point that the Church in the fourth century, both in the East and in the West, prohibited marriage with a deceased wife's sister. A question may, however, be raised, which may be formulated thus : Was the Church in that century carrying on

¹ Damasus says: "Nam lex dicit: 'Maledictus qui cum uxoris suae sorore dormierit.'" In the Lyons Heptateuch Deut. xxvii. 23 reads thus: "Maledictus qui dormierit cum sororem uxoris suae; et dicet omnis populus: Fiat" (cf. *Heptateuch. part. posterior. vers. Latin. Antiquiss. e codice Lugdunensi*, edit. U. Robert, Lyon, 1900, p. 31). The Fathers of the third Council of Orleans (May 538), in their tenth canon (Mansi, *Concilia*, ix. 14, 15), after forbidding Christians to enter into any of the incestuous unions which had been forbidden by canons of earlier councils, and after decreeing that those who had done so should not be admitted to Communion until they had separated from the partners of their guilt, go on to say: "quia in lege Domini manifeste legitur: 'Maledictus qui dormit cum uxore patris sui, cum privigna, vel uxoris suae sorore,' et reliqua his similia. Quo fit ut quos Deus maledixit, nos nisi emendatos benedicere non possimus." These Bishops must have used the Old Latin Version, and must have read in it the same clause in Deut. xxvii. 23 as Damasus had read in it 168 years earlier. It would be interesting to know whether there is any proof that the *Vetus Latina* did not include that clause, from the time when that version first came into existence, which was in the second century, if not in the first.

a traditional usage, or did she change the traditional usage in order to conform her practice to what she was beginning to regard as a more scriptural discipline ?

To me it seems that she was clearly carrying on her traditional usage, although at the same time she regarded that usage as entirely consonant with the teaching of Holy Scripture.

The canons of Elvira and Neo-Caesarea, and the answers of S. Timothy of Alexandria to the questions of his clergy, evidently presuppose a traditional usage. There is no trace in them of an appeal to Holy Scripture. They simply express and enforce the customary law of the Church. S. Basil, in his letter to Diodorus, writes in the tone of one who is answering an innovator. This innovator had attacked the custom of the Church by an attempt to prove, from Lev. xviii. 18, that marriage with a deceased wife's sister was lawful. S. Basil, in his reply, appeals in the first place to the immemorial custom of the Church ; and then, placing himself on the ground taken by his antagonist, he shows that Lev. xviii. 18 records a law which has no binding force on Christians, as indeed it has not ; and S. Basil proceeds to show that Lev. xviii. 6-17 contains a principle and a code of laws which strongly support the Catholic tradition. Similarly, Pope Damasus writes to the Bishops of Gaul, some of whom were appealing to the Deuteronomic law of the levirate, and to the practice of the Patriarch Jacob, in defence of their opposition to the custom of the Church, and the Pope says that he is well

aware that there are some Bishops who presumptuously change the tradition of the Fathers, and so fall into the darkness of heresy ; but, when he comes to deal with the particular question of marriage with a deceased wife's sister, he shows that the arguments from the law of the levirate, and from the practice of Jacob, have no force capable of upsetting the Christian rule of life. It is the opponents of the Church's law who appeal to Scripture, using, however, very weak arguments. The defenders of that law first entrench themselves on the strong ground of tradition, and then sally forth, and, after refuting the weak arguments of their opponents, show that Scripture, rightly interpreted, mightily corroborates the Church's inherited discipline.

Here I might stop, because, having shown that the existing teaching and discipline of the Church of England on the matter under discussion is entirely consonant with Holy Scripture and the tradition of the primitive Church, I have, I hope, given the strongest possible reasons for calling upon all loyal Churchmen to unite in the defence of their God-given inheritance. But I am loth to leave a gap unfilled. And so I shall make some attempt to show how the Catholic teaching was handed on by the later Fathers and by the mediaeval Councils, and by the Schoolmen and later Theologians up to the age of the Reformation and to the present day.

CHAPTER V

THE TEACHING AND PRACTICE OF THE CHURCH
IN REGARD TO MARRIAGE WITH A DECEASED
WIFE'S SISTER DURING THE FIFTH AND FOUR
FOLLOWING CENTURIES

I WILL begin by quoting passages from Fathers and Councils later than the fourth century, in which it is taught or implied that the matrimonial codes, whether in Lev. xviii. or in Deut. xxvii., are binding on Christians.

S. Augustine, in his treatise entitled *Speculum*, or *The Mirror*, which was written about three years before he died, explains in the preface to that treatise its rationale. He begins his preface by saying that everybody knows that in the Sacred Scriptures, that is to say, in the Law, the Prophets, the Gospels, and the Apostolic writings, some things are written simply that they might be known and believed ; and some things are either enjoined or forbidden, in order that they might be either observed or avoided ; and of those things which were written in the way of command or prohibition, some things were intended to be typical, such as the Sabbath and the unleavened bread, and the Paschal lamb, and other ceremonies which were enjoined

on the people of the Old Testament, but are *not* now observed by the Christian people. But there are other things which, he says, "are to be observed even *now*, if they have been ordered to be observed, and are to be avoided even *now*, if they have been prohibited. I will mention," he says, "as examples of what I mean. . . . 'Honour thy father and mother,' and 'Thou shalt not commit adultery.' Now therefore I have set myself to compose this work which I have taken in hand, with the intention of dealing with those matters which are so mentioned in Holy Scripture either in the way of command or of prohibition or of permission, as that even *now*, that is, in the time of the New Testament, they are essentially connected with practical piety and morality; so that I propose by God's help to collect all such passages from the canonical Scriptures, and to bring them together, as it were, into one Mirror (*Speculum*), that they may be easily inspected. . . . And in gathering together such Divine precepts as come within the scope of our undertaking, let us make our start from the very Law which was given through Moses." ¹ S. Augustine then goes on to quote at length the moral precepts of the Divine Law, beginning with those which he finds in Exodus, Leviticus, Numbers, and Deuteronomy, and passing on to other books of the Old and New Testaments. Out of Leviticus he extracts from the eighteenth chapter the whole code of the prohibited degrees of consanguinity and affinity with

¹ S. Augustine, *Opp.* edit. Ben., 1689, tom. iii. part. i. coll. 681, 682.

its appendix (Lev. xviii. 6-24) ;¹ and from other chapters of the same book he extracts other precepts which belong to the department of morals, and are consequently binding on the Christian people.²

In the third book of his *Quaestiones in Heptateuchum*, when S. Augustine has to discuss the nineteenth verse of the eighteenth chapter of Leviticus, which contains one of the laws in the appendix to the matrimonial code, he remarks that there was a law on the same subject in an earlier chapter in the Book of Leviticus,³ and he raises the question why there are two laws on the same subject in different parts of the book. It is to be noted that in the earlier passage the law is included among a number of laws dealing with ceremonial purifications after legal defilement. And S. Augustine points out that, if it had been only found there, Christians would have supposed that it ought now to receive only a figurative interpretation, and that it was in no way binding on us in its literal meaning. But, S. Augustine says, the law is repeated here, that is in the eighteenth chapter, "where the prohibitions are of such sort as ought

¹ On the other hand, as has already been pointed out (see above, on p. 47, n. 3), S. Augustine, when he comes to the book of Deuteronomy, omits the whole section of Deut. xxv., which enunciates the law of the levirate. He rightly judged that that law was a civil or municipal law sanctioned by God for the Israelite people, and not one of the moral laws which bind the whole human race, and have been handed on by our Lord to His Church. Similarly S. Thomas (*Summ. Theol.* 1^{ma} 2^{dae} qu. cv. art. iv. ad. 7^m) discusses the law of the levirate in one of the *quaestiones* which deal with the *praecepta judicialia* of the Mosaic Law, and not in the *quaestio* which deals with the *praecepta moralia* of that same law.

² Cf. *Op. cit.*, coll. 685-687.

³ Lev. xv. 24.

undoubtedly to be obeyed even in the time of the New Testament, when the observance of the ancient shadows has been abolished."¹ These two passages, taken from two different works of S. Augustine, show clearly that he regarded all the laws recorded in Lev. xviii. as being moral laws, and therefore binding on Christians, so far as they were applicable to Christians. I add this last qualification, because the law recorded in Lev. xviii. 18 presupposes a state of things in which polygamy is permitted or tolerated. Now, polygamy is not tolerated among Christians; and therefore the law recorded in the eighteenth verse of the chapter, although it is a moral law, has no application to persons living under the New Covenant; unless, indeed, it might be regarded as enhancing the guilt of a Christian, who, in defiance of his religion, should not only practise polygamy, but should live in marriage union with two sisters at the same time; a ghastly supposition, but, I am sorry to say, not inconceivable.

Let us now pass from the greatest of the Latin

¹ S. Augustine, *Quaestiones in Heptateuchum*, lib. iii. qu. lxiv., *Opp.* tom. iii. part. i. col. 518. The *Quaestiones in Heptateuchum* were written about the year 419, that is to say, about eight years before S. Augustine wrote the *Speculum*. As might be expected, S. Gregory the Great (*Baed., Hist. Eccl.*, lib. i. cap. 27, § 68) and S. Thomas Aquinas agree substantially with S. Augustine on the moral character of the law recorded in Lev. xviii. 19. Discussing the question whether "liceat mulier imenstruatae debitum petere" (in *4th librum Sentent.*, distinct. xxxii. art. ii. qu^a ii.), S. Thomas lays down that this was forbidden in the old law partly for a ceremonial reason and partly for a moral reason; and he concludes that "hoc praeceptum [sc. Lev. xviii. 19] obligat in nova lege propter secundam rationem, etsi non propter primam." And speaking of those times, "quando naturaliter mulier patitur fluxus menstruorum," he concludes that now under the Gospel "prohibitum est ad talem accedere; et similiter prohibitum est mulieri in tali fluxu debitum petere."

Fathers to the greatest of the Roman Popes, who was also the Apostle in will, and through his agents in deed, of the English nation. I mean of course, S. Gregory the Great, whose episcopate extended from 590 to 604.

The Venerable Bede, in the first book¹ of his *Ecclesiastical History of the English Nation*, has preserved for us a singularly interesting letter² addressed by S. Gregory to his disciple, S. Augustine of Canterbury, who with his companions first brought the Gospel and the Church to the English people. S. Augustine had questioned S. Gregory on nine points, and in this letter S. Gregory replies to each of S. Augustine's questions, point by point. Over and over again in his letter S. Gregory implies that questions connected with the prohibited degrees are to be mainly decided by reference to Holy Scripture, and especially by reference to the eighteenth chapter of the Book of Leviticus.

Thus S. Augustine had asked, in his fourth question, "Whether two brothers may marry two sisters, which are of a family far removed from themselves?" S. Gregory answers in the way we should expect: "This may assuredly be done; *for nothing is found in Holy Writ which seems to contradict it.*"

In his answer to S. Augustine's fifth question, S. Gregory bases his objection to the inter-marriage

¹ Cap. 27.

² The authenticity of this letter was formerly denied by Duchesne, but is now accepted by him. On the subject of its authenticity he refers to Mommsen, *Neues Archiv.*, vol. xviii. pp. 390, 395 (see Duchesne, *Origines du Culte Chrétien*, third English edition, 1910, p. 99, n. 1).

of first cousins partly on his experience that the offspring of such wedlock cannot thrive, and partly because "the Divine Law forbids a man to 'uncover the nakedness of his kindred,'" where he is quoting the general principle laid down in Lev. xviii. 6.¹

In the same answer S. Gregory goes on to speak about marriage with a step-mother. He says, "To marry with one's step-mother is a heinous crime, because it is written in the Law, 'Thou shalt not uncover the nakedness of thy father':² now the son indeed cannot uncover his father's nakedness: but, in regard that it is written, 'They shall be two in one flesh' (Gen. ii. 24), he who may have presumed to uncover the nakedness of his step-mother, who was one flesh with his father, certainly uncovered the nakedness of his father." Here the saint bases his prohibition wholly on the law in Lev. xviii., and explains the rationale of the law by a reference to the great passage in Gen. ii.

These passages prove clearly that S. Gregory the

¹ S. Gregory seems to think that the code in Lev. xviii. forbids the marriage of first cousins. No doubt the general principle laid down in verse 6 might, taken by itself, be interpreted so as to exclude such marriages. But the examples of the application of that principle, given in verses 7-17 inclusive, do not go beyond the third degree of relationship, whereas first cousins are related in the fourth degree. It is curious that two hundred years earlier S. Ambrose had made the same mistake. In his 60th Epistle addressed to Paternus (*P.L.* xvi. 1184) he says: "Cum lex divina etiam patruales fratres prohibeat convenire in conjugalem copulam, qui sibi quarto sociantur gradu." On the other hand, S. Augustine of Hippo was quite aware that the marriage of first cousins was not forbidden by the Divine Law (cf. *De Civitate Dei*, xv. 16, and see below, pp. 151, 152).

² S. Gregory's quotation gives the substance of Lev. xviii. 8, though the citation is not made with verbal accuracy.

Great regarded the law in Lev. xviii. as a moral law, and therefore binding on Christians.

In the same fifth answer S. Gregory discusses the marriage of a man with his brother's widow, that is, with his own sister-in-law, and he says: "It is also prohibited to marry with a sister-in-law, because by the former union she has become the brother's flesh." Then he illustrates this by the Baptist's rebuke of Herod Antipas. Afterwards he touches on the fact that many of the English, while still heathen, are said to have been joined "in this abominable matrimony" (*huic nefando conjugio*), and he directs that the parties to such a marriage "are to be admonished to abstain from each other, and be made to know that this is a grievous sin. Let them fear the dreadful judgement of God, lest, for the gratification of their carnal appetites, they incur the torments of eternal punishment. Yet they are not on this account to be deprived of the Communion of the Body and Blood of Christ, lest we should seem to revenge upon them those things which they did through ignorance, before they had received baptism." The question as to how converts from heathenism, who before their baptism entered into marriage unions such as Christians would not be allowed to contract, are to be treated, is a very wide and a very difficult one. It is a question which is continually being discussed even now in the synods of missionary dioceses and in the synods of provinces which include missionary dioceses. I cannot myself think that S. Gregory's treatment of it is a very happy one. He seems to

regard those who live in such unions as persons living in deadly sin, who have nothing to look forward to but "the torments of eternal punishment," but who are nevertheless to be admitted to the Holy Communion. It would seem to be more reverent and more consistent to follow one or other of two alternative courses. Either they should be admitted to Holy Communion, and in that case it must be on the supposition that God tolerates such marriages among the heathen, and that such toleration is continued after persons so married have become baptized Christians. On this theory the Christian partners to the union must, if they live in faith and hope, and love and obedience, be regarded as persons living in the state of grace, and as inheritors of the kingdom of heaven. Or another line may be taken, which was in fact the line taken *generally* by the Schoolmen.¹ It must be taught that marriages, forbidden by the *Divine* Law on account of near kinship, are forbidden not only to Christians but also to the heathen; and if any have contracted such forbidden marriages in their heathen days, and afterwards have become converts, baptism must be refused to them, until somehow or other, either by death or separation, the forbidden union has come to an end. I confess that to me the doctrine of the older Schoolmen

¹ This line is taken by S. Thomas, S. Bonaventura, Richard Middleton, Durandus, Major, De Palude, Waldensis, Altissiodorensis, Petrus de Soto, and Viguerius, and also by a number of the mediaeval canonists (cf. Sanchez, *De Sancto Matrimonio*, lib. vii. disp. lii. § 5, edit. Lugdun., 1739, tom. ii. p. 190). As will be seen later, Duns Scotus started new views on these matters, and his disciples followed him (see below, pp. 102-105).

on this point seems more in accordance with Holy Scripture than the alternative teaching which was mentioned first. But either of these two views would appear to me to be better than the view indicated by S. Gregory.

When, however, S. Gregory comes to consider the case of a Christian man marrying his Christian sister-in-law, he makes the teaching of the Universal Church his own. He says: "But all who come to the faith are to be admonished not to do such crimes. And if any shall be guilty of them, they are to be excluded from the Communion of the Body and Blood of Christ."

Although S. Gregory is here speaking only of a marriage with a brother's widow, he would no doubt have given the same directions about a deceased wife's sister. I do not think that anywhere in Christian antiquity is any distinction made between the two different kinds of sisters-in-law.¹ Both kinds come within the prohibited degrees.

I have now shown that S. Augustine of Hippo and S. Gregory the Great, following the teaching of their predecessors, S. Basil and S. Damasus, taught that the legislation of the Old Testament concerning prohibited degrees of kindred and affinity has not

¹ Canonists, who wrote just before the Council of Trent, and also others, who wrote after that Council, agree on this point with the more ancient writers. Thus Rigantius (*Commentaria in Regulas, &c., Cancellariae Apostolicae*, Reg. xlix. nn. 43, 44, tom. iv. p. 12, edit. Rom. 1747), comparing marriage with a brother's widow and marriage with a wife's sister, says: "Utroque casu aequale esse vinculum affinitatis et parem turpitudinis rationem late probat Cajetan. tom. iii. tract. xiii. *ad Angliae regem*, versic. Conferendo, Azor—*Instit. Moral.* tom. ii. lib. v. cap. 4, quaest. 4, vers. tertio."

been annulled by our Lord, but is still binding on the people of the new Covenant.

Witness is borne to the same teaching by Spanish and Frankish councils of the sixth century, and by the very important Eastern Council in Trullo, held at Constantinople in the last decade of the seventh century, and by a Roman council of the eighth century, as well as by other councils.

Thus the second Council of Toledo, held in 527, in its fifth canon prohibits marriage of those near of kin¹ on the ground of the legislation recorded in Lev. xviii. And the Council of Clermont, in Auvergne, held eight years later, decrees in its twelfth canon that, if any one should think that it is allowable to violate "*carnalis contagii consortio*" the widow of his brother, or the sister of his wife, or other near relations, "and with sacrilegious audacity should break down *the authority of the Divine Law (auctoritatem divinae legis) and the dictates of nature (ac jura naturae)*," "he shall, so long as he continues to commit such grievous wickedness, be separated from the Christian assembly and banquet, and be deprived of the communion of the Church, his mother."² Three years later, that is to say, in 538, the third Council of Orleans in its tenth canon³ renews the legislation of earlier councils in regard to the prohibited degrees, and, until the guilty parties separate from each other, cuts off from the communion of the Church those who have con-

¹ The Council does not specify any degrees, but includes all who are near of kin, "as long as he knows the lineaments of affinity by descent."

² Mansi, *Concilia*, viii. 861.

³ Mansi, *op. cit.*, ix. 14, 15.

tracted unions, which should be described as incestuous adulteries rather than as marriages ; " because," the Council goes on to say, " it is manifestly written in the law of the Lord, ' Cursed is he who sleeps with his father's wife, or with his step-daughter, *or with his wife's sister*,' and the other degrees similar to these ; whence it follows that we cannot bless those whom God has cursed, until they have amended their lives." In this passage the Council bases its legislation on the Old Latin translation of Deuteronomy xxvii. 23. The Council, however, following in this the example of the Council of Agde,¹ allows converts from heathenism to be baptized without putting away their incestuous partners, even though they had married their step-mother or step-daughter, and apparently it permits bishops to condone such unions when contracted by Christians if these Christians were wholly ignorant of the fact that their marriages were forbidden by the laws of God and of the Church. In sanctioning these relaxations of the holy law of God, the Council was arrogating to itself a measure of authority which it did not possess, and its conduct can only be excused by a consideration of the ignorance and barbarism which prevailed in Gaul in the sixth century.

The third Council of Paris, held in the year 557, enacts as follows in its fourth canon :² " Let no one therefore presume, *in contravention of the precept of the Lord*, to be a partner in unlawful marriages ; that is to say, let him not dare to join to himself

¹ On the Council of Agde, held in 506, see below, p. 84.

² Mansi, *Concilia*, ix. 745.

his brother's widow, or his step-mother, or the widow of his paternal uncle, *or his wife's sister*: nor let him contract marriage with the widow of his maternal uncle, nor with his daughter-in-law, nor with his mother's sister." The canon goes on to condemn marriage with a man's paternal aunt, and with his step-daughter, and with the daughter of his step-daughter. None of these relationships go beyond the third degree, and they are therefore all included either explicitly or implicitly among the prohibitions recorded in Leviticus xviii. The Council was therefore strictly correct when it spoke of such unlawful marriages as being "*contra praeceptum Domini*."

Ten years later, in 567, the second Council of Tours embodied in its twenty-first canon¹ the whole of the section, Leviticus xviii. 5-18, and also the section, Deuteronomy xxvii. 15-24, quoting these passages from the Vulgate translation. It also embodied in the same canon canons dealing with the prohibited degrees and enacted by three earlier Frankish councils, namely the first Council of Orleans (511), the Council of Epaone (517), and the Council of Clermont (535). Thus the twenty-first canon of the second Council of Tours set forth a code of canon law bearing on the prohibited degrees, together with that portion of the Divine Law which dealt with the same subject, and formed the basis and justification of the canonical enactments. This was done, as the Council expressly states, in order that the whole code, with its proofs

¹ Mansi, *op. cit.*, ix. 800-803.

from Holy Scripture, might be read from time to time in the hearing of the people, so that attempts to excuse incestuous marriages on the ground of ignorance might be stopped in the future.

The five councils of the sixth century, which I have quoted, refer to the law of God, as set forth in the Old Testament, as the ground of their legislation; and of these the four Frankish councils explicitly mention marriage with a deceased wife's sister as forbidden. There are at least three earlier Frankish councils belonging to the same sixth century which expressly forbid marriage with a deceased wife's sister, but do not happen to refer to either the Levitical or the Deuteronomic prohibitions. These are the Council of Agde¹ (canon 61) held in 506, the first Council of Orleans² (canon 18) held in 511, and the Council of Epaone³ (canon 30)

¹ Mansi, *op. cit.*, viii. 335.

² Mansi, *op. cit.*, viii. 354.

³ Mansi, *op. cit.*, viii. 562, 563. The Council of Epaone was a council of the bishops belonging to the kingdom of Burgundy. The 30th canon of that Council was passed by S. Avitus of Vienne, Viventolus of Lyons, and their suffragans in view of the scandal given by Stephen, the Treasurer of the Burgundian King, Sigismund, who had married Palladia, his deceased wife's sister, and had thereupon been excommunicated by his bishop. A persecution of the bishops by the civil power followed this excommunication. However, eleven of the bishops, under the presidency of Viventolus, met in council at Lyons later in the same year, 517, and passed six canons dealing with the case of Stephen. The heading of the canons of the Council of Lyons in Mansi (viii. 567, 568) runs thus: "Synodus vel Constitutio Sanctorum Patrum contra Stephanum, qui oblitus *divinas* et humanas leges cognatae suae ausu nefario se sociavit." Cf. *Acta SS.*, tom. iii. Octobr., pp. 45-65. See also S. Avitus's letters about Vincomalus, a citizen of Grenoble, who had contracted a similar incestuous marriage (*Epp.* 14, 15, 16, *P.L.* lix. 232-235). It should be noted that King Sigismund had only lately come to the throne, and being a Catholic, had restored the Catholic Church to its due place of honour. Sigismund's father, King Gundobald, had been an Arian, and as such had favoured the Arian hierarchy under whose lax rule incestuous marriages seem to have become common in Burgundy.

held in 517. It may be well to say a few words about the sixty-first canon of the Council of Agde, the first of the three councils mentioned above. This canon lays down that the guilty parties can have no hope of forgiveness until they have separated from each other, and that, after they have separated, they will be free to contract a better marriage. It also says that either extra-conjugal intercourse or marriage within any of the degrees prohibited in the canon is an incestuous act not only since the canon was enacted, but also previously. The Council did not undertake to make new legislation on this matter, but only promulgated old laws for the benefit of the newly converted Franks. The canon further lays down that persons, who break its regulations and afterwards separate, are to remain and worship along with the catechumens, until due satisfaction has been made.

I now pass to the Council *in Trullo*, which was held at Constantinople in 692, and is regarded by the Eastern Church as having ecumenical authority, and as being in fact a sort of continuation of, or supplement to, the fifth and sixth Ecumenical Councils, for which reason it is often called the Quini-sexst Council (ἡ πενθέκτη σύνοδος). This Council in its fifty-fourth canon¹ begins by quoting the general principle, as laid down in Lev. xviii. 6, and it says that, starting from this plain teaching of Holy Scripture, S. Basil has enumerated in his canons some of the prohibited degrees, passing over, however, many of these in silence. The canon does

¹ Mansi, *Concilia*, xi. 968.

not repeat the prohibited degrees mentioned by S. Basil, because in its second canon it had already included his canons in the code, which it recognized as having force of law in the Church; but it adds a number of degrees to S. Basil's list. It will be remembered that S. Basil, grounding his ruling on the Levitical code and on the immemorial tradition of the Church, had prohibited marriage with a deceased wife's sister.

Pope Zacharias, in a Roman Council of the year 743, does not profess to give an exhaustive list of prohibited degrees, but mentions in the sixth canon four of them,¹ and bases his prohibition on Lev. xviii. Probably cases involving those four degrees had been submitted to the consideration of the Pope and of his colleagues in the Council. One of the marriages explicitly prohibited is that of a man with his brother's wife, which is a case of affinity in the transverse line and in the second degree.² As I have already pointed out, the Fathers and Councils of the Church never distinguish between the two kinds of sisters-in-law; that is to say, they regard both kinds as equally prohibited by the Divine law. Since this Roman Council explicitly forbids a man to marry his brother's wife, we may be sure that, if the case had been brought before it, a man would also have been forbidden by the Council to marry his wife's sister.

¹ *Op. cit.*, xii. 383.

² According to the numbering of the degrees followed by the early Church and by ourselves.

Before passing away from these councils of the earlier Middle Ages, I will quote one more canon from a council held during the reign of Charles the Great, because his reign was the beginning of a new era. The Council of Mentz, held in June 813, decreed in its 56th canon as follows: "If any man . . . should marry two sisters, or if any woman should marry two brothers . . . we order that such couplings shall be anathematized and brought to an end by separation."¹

¹ *Op. cit.*, xiv. 75.

CHAPTER VI

THE TEACHING OF LATER MEDIAEVAL POPES AND
SCHOOLMEN UP TO THE END OF THE PONTIFI-
CATE OF MARTIN V.

I THINK that I have now shown that the primitive laws of the Church about the prohibited degrees, which were themselves based on the Divine laws given by God to the Israelite nation and recorded by inspired writers in the Pentateuch, were, after the inroads of the barbarian nations and the consequent break up of the Western Empire, faithfully transmitted and applied by the Church during the early Middle Ages both in the West and also in the Byzantine East.¹ It is true that both in the East and West the Church extended these prohibitions beyond the limits sanctioned by the Divine law. There may have been isolated instances of such extensions, authorized by individual Bishops, in the fourth and fifth centuries; but if so, it

¹ I am not aware of any evidence which can be quoted on the opposite side. So far as I know, no Council or Bishop or theologian or canonist during the first twelve hundred and fifty years of the Church's history, either in the East or West, ever expressed the view that it was allowable for a Christian man to marry his deceased wife's sister, or to marry any one else related to him within any of the other degrees prohibited either explicitly or implicitly by the Levitical code.

was done under the impression that these extensions were covered by the Divine law.¹ We do not find them enforced on any large scale or by conciliar legislation until the sixth century ; and thenceforth the Church seems to have been conscious of the difference between the original prohibitions, which rested on the Divine Law, and the later prohibitions, which rested on her own synodical legislation or on the civil laws of the Roman Empire. When the Popes began in the eleventh century to grant dispensations to individuals, allowing them to marry within the prohibited degrees, they granted such dispensations only in connexion with degrees which were prohibited by human law ; they never until the close of the fifteenth century ventured to grant dispensations in regard to degrees prohibited by the Divine Law.

This thoroughly commendable self-restraint practised by the Popes may be illustrated by some passages from the decretal epistles of Pope Innocent III., whose pontificate extended from 1198 to 1216.

For example, there is a decretal addressed in 1201 by that Pontiff to the Archdeacon of Bourges,² which was included in the *Corpus Juris Canonici* by Gregory IX., and is usually spoken of as the

¹ I have no certain knowledge that there were any such instances ; but, as I have already pointed out, S. Ambrose was under the mistaken impression that the marriage of first cousins was forbidden by the Divine Law (see above, on p. 76, n. 1) ; and he and others influenced by his teaching may have put his theory into practice, and have forbidden first cousins to marry.

² *Decretall.* lib. ii. tit. xiii. cap. xiii., *Corp. Jur. Canonic.*, edit. Friedberg, 1881, ii. 286, 287.

Chapter, *Literas tuas recepimus, quod, quum*. The Archdeacon, who in the absence of the Diocesan was charged with the administration of the diocese to which he belonged, had asked certain questions arising either immediately or remotely out of a case which had come before him for settlement. A certain man had, apparently without first obtaining a dispensation, married a woman related to him in the fourth degree of consanguinity.¹ Subsequently the woman left her husband, and he was now petitioning the Archdeacon to issue an injunction for the restitution of his conjugal rights. The first two questions propounded by the Archdeacon ran as follows : (1) "When in disproof of the validity of a marriage a certain degree of consanguinity is pleaded, in which the Apostolic See cannot dispense,

¹ According to the mode of computing the degrees, which the Latin canonists used in the later Middle Ages, and still use, the fourth degree of consanguinity would mean that the parties were third cousins to each other, or second cousins once removed. On the different modes of computing the degrees see below, p. 121. If we use this later Latin mode of computing the degrees, we shall say that the Divine Law only prohibited relationships in the first degree, and also some of the relationships in the second degree. The remaining relationships in the second degree, and all relationships in higher degrees as far as the seventh inclusive, were forbidden—not by the Divine Law, but by the canons of the Church, that is, by human law. Pope Innocent III., in the last year but one of his life, at the fourth Council of the Lateran, abrogated the canons which made the fifth, sixth, and seventh degrees of relationship to be impediments to marriage. Even after that change in the law the fourth degree remained an impediment. It was, of course, competent for the Latin Church to make this change, because she was abrogating impediments which she herself or the local churches of her communion had created. About three and a half centuries later, the English Church carried still further the process which Innocent had begun, and abrogated for her own people the impediments arising from relationships in the fourth and third degrees, and also from some of those in the second degree, and retained only the impediments recognized by the Divine Law.

and has not been accustomed to dispense, and the proofs are ready and at hand, should restitution be granted or refused? (2) If some dispensable degree or other dispensable impediment be adduced in argument, and, as in the former question, proofs are at hand, should restitution be conceded or refused?" The Archdeacon assumes in these questions that the prohibited degrees of consanguinity are divisible into two classes, namely, first, those in which both theory and practice prevent the Pope from dispensing, and, secondly, those in which he has indisputably the power to dispense. Innocent III. in his reply begins by saying that there are three different opinions current as to the proper order of proceeding in such cases. Some hold that restitution should first be granted, and afterwards the arguments for and against the validity of the marriage be considered and a decision thereon be pronounced; and they quote a decision of Pope Lucius III. in support of their view. Others hold that restitution of conjugal rights should not be granted until the question of the existence of a prohibited degree of relationship or other impediment has first been argued and decided; and the holders of this view quote in their favour a decision of Pope Clement III. A third party follows a middle course, and says that restitution is sometimes to be granted at once, and at other times to be altogether refused. Concerning this opinion Innocent says: "It seems to fit in not incongruously with the third opinion that in degrees of consanguinity *which are prohibited by*

the Divine Law the way leading to restitution should be closed in advance (*restitutioni aditus praecludatur*), but in those which are interdicted by human legislation restitution *cum effectu* may find a place; since in the former *dispensari non possit*, and in the latter *valeat dispensari*, as Blessed Gregory and many others have dispensed.¹ Therefore he does not sin, who, in the situation last supposed, at the command of the Church, *reddit debitum conjugale*. We then *ad praesens* condemn no one of the above-mentioned opinions, nor do we wish to create any prejudice against any of them by our answer, although it is to be observed that the injunction of Pope Lucius was a mandate affecting the party in possession, while the reply of Clement related to the party petitioning. Moreover, since a woman who has knowledge of the fact that she is related [to the man she has married] by consanguinity cannot, especially when the consanguinity is in degrees prohibited by the Divine Law, have intercourse with the man to whom she is so related, without mortal sin, since all that is not of faith is sin, and whatever is done against the dictate of conscience paves the road to hell (*aedificat ad gehennam*), it would be useless to make a judicial order

¹ The allusion is not to any dispensations granted by S. Gregory to individuals, there being no record of individual dispensations, in regard to the impediments of consanguinity or affinity, having been granted until the eleventh century. Pope Innocent is, I think, alluding to a spurious letter, which was supposed to have been addressed by S. Gregory to Felix, Bishop of Messina, informing him that he had allowed the English converts, on account of their newness in the faith, to marry their second cousins, but that he meant to draw the lines tighter, when their faith should be riper.

for the restitution of conjugal rights in favour of the man who has been dispossessed of them, since the woman ought not to obey the judge in this matter against the known will of God (*contra Deum*), but she ought rather to endure humbly excommunication. And thus a very tangled difficulty would arise; because on account of the judicial decision she ought *reddere debitum*, and yet on account of the dictate of her conscience she ought not *reddere debitum*.

“Therefore it seems to me better, when consanguinity is pleaded in opposition, *especially in degrees prohibited by the Divine Law*, and proofs are offered which are ready at hand, that in regard to other points a decree of restitution should issue, but that, after receiving for the sake of greater security a declaration on oath that such an objection [viz. of the existence of consanguinity] is not raised fraudulently, then in regard to the one point of conjugal intercourse, restitution should be deferred, above all, if common report confirms the declaration about consanguinity, till, after the proofs have been heard and discussed, the case is definitively settled; since it is better for either party to be left free in this way than to remain in such fetters.” In this decretal Innocent identifies the degrees of consanguinity, from which the Pope cannot dispense, with the degrees which are prohibited by the Divine Law, that is to say, by the Levitical and Deuteronomic enactments; and he identifies the degrees, from which the Pope can dispense, with the degrees which are interdicted by human legislation, that

is to say, degrees interdicted by the canon law of the Church outside of and in addition to those forbidden by the law of God. The case at Bourges which gave rise to this decretal was a case in which *consanguinity* was pleaded, and therefore both the questions and the reply contain no allusion to relationship by affinity. But of course the enactments of the Sinaitic law, to which the Pope by implication refers,¹ put affinity on a line with consanguinity, and within the limits laid down prohibit both equally. It follows that the principles set forth by Innocent are applicable to prohibited degrees in affinity as well as to those in consanguinity.

There is another decretal letter, known from its first word as the Chapter *Gaudemus*, and addressed by the same Pope, Innocent III., in the same year, 1201, to the Bishop of Tiberias. This decretal also finds a place in the *Corpus Juris Canonici*.² The Bishop of Tiberias had asked whether pagans (pagani), who had been married to women related to them in the second or third or some higher pro-

¹ Even the Jesuit, Father Harper, who in a lengthy but curiously unconvincing book tries to make out a case in favour of the permissibility of marriage with a deceased wife's sister, has the candour to admit that Pope Innocent in this decretal means by the Divinely prohibited degrees those which are "prohibited by the natural law as specified and extended in the positive Divine enactments given from Mount Sinai" (see *Peace through the Truth*, series ii., part i., p. 329).

² *Decretall.* iv., xix., viii., *Corp. Jur. Canon.*, ed. Friedberg, ii. 702. There is another letter written by the same Pope, Innocent III., and addressed to the Archbishop and Chapter of Tyre, which lays down the same principle, namely, that non-Christians who were before their conversion married within degrees prohibited only by the canon law, are not after their conversion to be separated. This letter also finds a place in the *Corpus Juris Canonici* (*Decretall.*, iv., xiv., iv.), and is known as the chapter *De infidelibus*.

hibited degree, and had afterwards been converted to the faith, were to be separated from their wives or to be allowed to remain in their marriage union with them. It is to be noted that the Bishop says nothing about pagans who had been married to women related to them in the first degree, because all relationships in the first degree, including the relationship of a brother-in-law to a sister-in-law,¹ were prohibited degrees according to the Divine law. Such marriages could not be allowed to stand good after conversion. But in the second degree there were some relationships, as of first cousins, which were not among the prohibited degrees according to the Divine law, and in the third and higher degrees there were no relationships prohibited by that law, though as far as the seventh degree all relationships were prohibited at that time by the canon law. The question therefore was confined to marriages between parties related in degrees prohibited by human law though allowed by the Divine law. Pope Innocent replies that pagans are not bound by the legislation of the canon law (*constitutionibus canonicis non arctantur*), and therefore their pagan marriages were lawfully contracted, and after their conversion they can freely continue to cohabit with their lawful wives. His whole argument implies that if, as pagans, they had been married to women related to them in degrees prohibited by the Divine law, such mar-

¹ Of course the writers of that age number the degrees according to the later mode of numbering, which was and is used by the Latin canonists.

riages would have been null and void from the beginning, and on their conversion they would have been bound to separate from them. The summary at the head of this chapter, *Gaudemus*, in the *Corpus Juris Canonici*, runs thus :—"Pagans married within a degree prohibited by the canon law only are not separated from each other when they are converted to the faith." "Pagani, juncti in gradu prohibito lege canonica tantum, conversi ad fidem non separantur."¹

It is clear that in the time of the great canonist and legislator, Pope Innocent III., the primitive principle, that the Divine laws about the prohibited degrees, given to Israel, were still in force under the new covenant, was faithfully guarded by the primatial Church of Rome. That Church went even further, and, in entire accordance with the teaching of Holy Scripture,² held that these Divine laws were binding on heathen nations. This was a distinct improvement on the teaching of some of the Frankish councils of the sixth century, and of S. Gregory the Great in his reply to the fifth of the nine questions put to him by S. Augustine of Canterbury.³ The Roman Church in the time of Innocent III. was also fully persuaded of the truth of another great principle, namely, that the Pope has no power to grant dispensations from

¹ I have copied the wording of this summary from Friedberg's critical edition of the *Corp. Jur. Can.* But the wording is precisely the same in the carefully corrected edition published at Rome by order of Pope Gregory XIII. in 1582, and declared by him to be authentic.

² See Lev. xviii. 24-30.

³ See above, pp. 77-79, and p. 81.

the prohibitions of the Divine law. It may be further pointed out that the inclusion of these decretals of Innocent in the *Corpus Juris Canonici* by Pope Gregory IX. must have greatly strengthened their binding force, and must have propagated the knowledge of them throughout Latin Christendom.

As might be expected, the teaching of Innocent III. in regard to these matters, which reproduced in fact the teaching of Holy Scripture and the tradition of the Catholic Church,¹ was assimilated and expounded by the great schoolmen of the thirteenth century. It will be enough to quote here the Angelic Doctor, S. Thomas Aquinas, and the Seraphic Doctor, S. Bonaventura.

S. Thomas, in his commentary on the fourth book of *The Sentences* of Peter Lombard (Distinct. xl. quaest. i. art. iii.), discusses the question, Whether consanguinity is an impediment to marriage by the law of nature? He answers that by the law of nature the relationship of parents to their children constitutes an impediment to marriage. But he goes on to say that the Divine law not only excludes children from intermarrying with their parents, but excludes also "other relations who must hold frequent intercourse with each other, and who in their dealings with each other are bound to guard their modesty; and this reason [for refraining from intermarriage] is em-

¹ I have considered in Appendix II. (see below, pp. 173-176) one other decretal letter of Innocent III., which has some bearing on the matter under discussion.

phasized in the Divine law,"¹ and then he quotes Lev. xviii. 10, which lays down one of the principles on which the Divine law about the prohibited degrees of consanguinity is based. He adds that human laws and the statutes of the Church have prohibited other degrees in addition to those prohibited by the natural law and by the Divine law. And he sums up his statement thus: "From what has been said it is clear that consanguinity is an impediment to marriage with some persons by the law of nature, and with some persons by the Divine law, and with some persons by the laws enacted by men."

Similarly in the next Distinction (xli. quaest. i. art. ii.) S. Thomas puts the question, "Whether affinity is an impediment to marriage," and after mentioning two arguments brought forward by opponents, he begins his reply to these arguments thus: "But in disproof [of these arguments] may be quoted that passage in Lev. xviii.—'The nakedness of thy father's wife *i.e.* of thy step-mother] shalt thou not uncover'; but she is only related to thee by affinity; therefore affinity is an impediment to marriage."² In other words, he bases his teaching that affinity is an impediment to marriage on a revealed precept of the Divine law, laid down in the Book of Leviticus.

Again in the thirty-ninth Distinction (quaest. i.

¹ "Alias conjunctas personas, quas oportet simul conversari, et quae debent invicem altera alterius pudicitiam custodire, et hanc causam assignat divina lex dicens."

² "Sed contra est, quod dicitur Levit. xviii.—'Turpitudinem uxoris patris tui non revelabis'; sed illa est tantum affinis; ergo affinitas impedit matrimonium."

art. iii. ad 3^{um}) S. Thomas says: "Unbaptized non-Christians (infideles) are not bound by the statutes of the Church; but they are bound by the statutes of the Divine law. And therefore if any non-Christians have married within the degrees prohibited by the Divine law, Lev. xviii., and if either both parties or one of the parties be converted to the faith, they cannot continue in such marriage; but if they have married within the degrees which are prohibited only by the enactment of the Church, they may continue their marriage union, if both are converted, or if, after the conversion of one of them, there be hope of the conversion of the other." Here S. Thomas holds fast to the scriptural teaching that the heathen and other non-Christians are bound by the enactments of the matrimonial code in Lev. xviii., though they are not bound by the canons of the Church as such. And it is to be remembered that the code of Lev. xviii. puts on its list of prohibited degrees more relationships by affinity than by consanguinity, and that one of the prohibited degrees of affinity mentioned in the code is the relationship of a brother-in-law to a sister-in-law.

The teaching of S. Bonaventura is precisely similar to that of S. Thomas in regard to those points on which he touches. He says: "The bond of consanguinity hinders marriage within certain degrees in obedience to the dictate of the natural law, within others in obedience to the prohibition of the Divine law, within others in obedience to the law of the Church." When, after dealing with the natural law, he comes to "the Divine

law," S. Bonaventura says: "Owing to the prohibition of the Divine law, consanguinity as far as the second degree forms an impediment to marriage, *as is clear from Lev. xviii.*, where the prohibition is extended as far as the second degree."¹ Further on he says: "Furthermore, in consequence of the Church's law, consanguinity from the second degree and onwards forms an impediment to marriage."² In this passage S. Bonaventura evidently implies that the whole of the matrimonial code in Lev. xviii. is an expression of the Divine law on the subject of the prohibited degrees; and it is evident that he regards that Levitical code as a code which binds Christians, because otherwise there would be an unaccountable gap between the degrees prohibited to Christians by the natural law and the degrees prohibited to them by the Church's law. The Levitical prohibitions are not merged in the body of prohibitions created by the Church. They stand on a separate and higher basis of their own, and they not only bind individual Christians, but they bind the Church, as resting on the authority of God. For this reason the Church cannot grant dispensations from prohibitions which belong to

¹ "Propter prohibitionem legis divinae impeditur matrimonium per consanguinitatem usque ad secundum gradum, sicut patet per Levitici decimum octavum capitulum, ubi fit prohibitio usque ad secundum gradum" (S. Bonaventur., *Commentar. in 4^m libr. Sentent.* dist. xl. art. unic. quaest. ii. concl., *Opp.* iv. 850, edit. 1889, ad Claras Aquas).

² "Ulterius, propter statutum Ecclesiae impeditur matrimonium a secundo gradu et deinceps" (*u.s.*). See also the observations of S. Bonaventura in the body of his *Conclusion*, after he has set forth negative and affirmative arguments in his discussion of dist. xxxix. art. ii. quaest. iv. In that conclusion his teaching is substantially the same as the teaching of S. Thomas, quoted above from S. Thomas's discussion of dist. xxxix. quaest. i. art. iii. ad 3^{um}.

the Divine law, though she can dispense from prohibitions enacted by her own authority.

This principle is clearly laid down by S. Thomas in his *Summa contra Gentiles* in a chapter which is headed: "Quod matrimonium non debet fieri inter propinquos." In that chapter he discusses the reasons why marriage within certain degrees is prohibited, and he goes on to deal with the dispensing power which may in some cases be used in this matter. He says: "There resides in legislators and in other similar persons the authority to dispense in that which has been enacted for the common good, so as to provide an adjustment which may be necessary in some particular case. And if, forsooth, the law has been enacted by men, dispensations from it may be granted by men who are authorized to dispense. But if the law has been given by God, dispensation from it can only be granted by Divine authority: as in the old law polygamy, concubines, and divorce seem to have been allowed by [Divine] dispensation."¹

And similarly, in the *Summa Theologica*, S. Thomas says: "The relation of every man to the Divine law resembles the relation of a private person to the public law of the State of which he is a subject. Wherefore, as in regard to a public human law, no one can dispense except the person from whom the law has its authority, or one to whom that person has committed the power of dispensing; so in regard to the precepts of the Divine law, *quae sunt a Deo*, no one can dispense except God, or he to

¹ S. Thomas (*Summ. contr. Gentill.* lib. iii. cap. cxxv.).

whom God should at any time specially commit the power of dispensing."¹

This teaching of the two great scholastic theologians of the thirteenth century was faithfully handed on by their successors in the fourteenth century. I will quote as an example the Dominican Petrus de Palude, who became Latin Patriarch of Jerusalem in 1329, and died in 1342. Speaking of the Pope, he says: "It is to be observed that he cannot dispense in the first degree, whether of affinity or consanguinity, either in the ascending or descending line, since marriage within those degrees is contrary to the natural law and to the Divine law. . . . Also in the transverse line in the first degree both of consanguinity and of affinity marriage is prohibited *jure divino*: nor can the Pope dispense in such cases."² It will be remembered that, according to the method of numbering the degrees which was used by the schoolmen, a man's relationship to his wife's sister is a relationship of affinity in the first degree in the transverse line.

¹ "Ad legem autem Divinam ita se habet quilibet homo, sicut persona privata ad legem publicam cui subicitur. Unde sicut in lege humana publica non potest dispensare nisi ille a quo lex auctoritatem habet, vel is cui ipse commiserit; ita in praeceptis juris divini, quae sunt a Deo, nullus potest dispensare nisi Deus, vel is cui ipse specialiter committeret" (S. Thom. Aq., *Summ. Theol.*, 1^{ma} 2^{dae}, q. xcvi. art. iv. ad 3^{um}). It may be worth observing that in the index to an edition of the *Summa Theologica*, published at a "Typographia Pontificia" in Turin in the year 1900, reference is made to this passage as proving that "*Solus Deus potest dispensare in praeceptis divinis, non autem papa.*" This same index, with the above-quoted entry and reference, occurs in other editions of the *Summa Theologica*, published elsewhere, s.v. "Dispensatio."

² Petr. de Palud., *Super quartum Sentent.*, dist. xli. art. v.

In the fifteenth century the old traditional doctrine and practice was maintained at Rome and elsewhere by the most distinguished theologians and canonists. I shall refer at a later stage to the testimony of Cardinal de Turrecremata and to the action of Pope Eugenius IV. At present it will be enough to mention the name of S. Antoninus, who was Archbishop of Florence from 1446 to 1459. On the subject of the impediment of affinity he quotes and makes his own the above-cited passage from Petrus de Palude;¹ and afterwards he gives a list of the degrees prohibited in Lev. xviii., mentioning among them the "*soror uxoris*," and he adds that "in a degree prohibited either by the natural law or by the Divine law none can dispense except God only, or some one whom God should by inspiration commission to do so; yet there is no record of such a dispensation having ever been granted to any one. But the Pope dispenses in those degrees which are prohibited by the *jus positivum*,² namely those in the fourth and third degrees, and even in the second degree he dispenses in the case of first cousins, between whom marriage was permitted by the law of Moses and by the Roman civil law."³

But in the beginning of the fourteenth century a new theory, which involved a breach with the traditional teaching of the Church, was started by

¹ S. Antonin., *Summ. Theol.* part. iii. tit. i. cap. xi. *De Affinitate*, edit. Veron., 1740, tom. iii. col. 42.

² The enumeration of the degrees, which S. Antoninus gives, proves that he uses here the expression *jus positivum* in the sense of *jus canonicum*.

³ S. Antonin., *op. cit.* cap. xiv. § ii., tom. iii. coll. 51, 52.

Joannes Duns Scotus, a brilliant Franciscan, who lectured first at Oxford and afterwards at Paris, and died in his forty-third year at Cologne in 1308. This bold innovator, who was known as "the subtle Doctor," deserting the teaching of the great luminaries of his Order, such as Alexander of Hales, S. Bonaventura, and Richard Middleton (*Ricardus de Media Villa*), taught that the impediment of affinity was created entirely by the legislation of the Church, and that it had no basis either in the law of nature or in the written law of God; and similarly he taught that the impediment of consanguinity rested indeed on the law of nature, so far as it prohibited marriage with a mother or grandmother and with a daughter or granddaughter, but as regards brothers and sisters, uncles and nieces, nephews and aunts, he held that the prohibition of intermarriage was created by the legislation of the Church, and not by any higher authority. Nearly two hundred years elapsed before this new doctrine was made the basis in practice of any granting of dispensations allowing individuals to marry within the Levitical degrees; but, so far as the doctrine was admitted in theory, it tended to prepare men's minds for the acceptance of such an enlargement of the scope of the papal dispensing power as would have been inconceivable to the most extreme papists of the age of Hildebrand or of Innocent III. Duns Scotus does not seem to have attempted any reasoned disproof of the weighty arguments from Scripture and tradition which underlay the hitherto accepted teaching of the

Church. He merely says that "there is not found in the law of the Gospel any prohibition in these matters sanctioned by Christ beyond the prohibition of the law of nature, and that Christ did not explicitly confirm the prohibitions recorded in the law of Moses."¹ It is evident that he had not duly weighed the great principle laid down by our Lord in the Sermon on the Mount: "Think not that I came to destroy the law or the prophets: I came not to destroy, but to complete" (S. Matt. v. 17).

However, Scotus was a supremely able person, and his theories were taken up and propagated by ardent disciples, who were specially numerous among the Franciscans, though not confined to the members of that Order. Here in England, for example, there was an influential Carmelite, Joannes de Bacon, who was born at Baconsthorpe, in Norfolk, and wrote commentaries on the *Quaestiones Scoti de Universalibus*. Concerning him the Jesuit Hurter says: "In philosophical and theological questions he dissents from S. Thomas and approximates to the teaching of the Scotists and Nominalists."² Towards the end of his life "he was summoned to Rome [? to Avignon] to give his advice on matrimonial questions: but, when he got there, he created much amazement, in that he laid claim on behalf of the Roman Pontiff to the possession of power in regard to diriment impediments based on the Divine law. But when so many grave

¹ Duns Scot., *Quaestiones in. lib. iv. Sentent.*, dist. xl. qu. i. et dist. xli. qu. i., edit. Venet., 1617, pp. 880, 882.

² Hurter, *Nomenclator Literarius*, edit. 1899, iv. 442.

theologians withstood him, he modestly retracted the opinion which he had expressed."¹ One can imagine the shock which the revolutionary theories of Scotus would produce, when they were first broached in the conservative atmosphere of the *Curia*. Afterwards Bacon returned to England, where he died in 1346.

But it is clear that, about eighty years after Bacon's modest retraction, the new views had made much progress in the *entourage* of the Pope. The great Western schism had been healed at Constance, and Martin V.² was trying with considerable success to restore the papal authority after the scandals of the previous forty years, during which Christendom had looked on, while two and sometimes three rival Popes anathematized each other. Concerning this Martin, S. Antoninus of Florence, to whom I have already referred, writes thus: "Yet Pope Martin V. appears to have granted a dispensation to a certain man who had contracted and consummated marriage with a certain woman, with whose sister he had previously sinned. It was with great difficulty that the Pope made up his mind to grant this dispensation; and he did so for the following reasons: (1) the previous sin was not known, and (2) the man was neither fit to become a Religious nor to migrate to a distance, so that there would have been scandal from the divorce, if it had taken place. The Pope first appointed a number of canonists and theologians to hold a conference on this case and to advise

¹ Hurter (*u.s.*).

² Martin's pontificate lasted from 1417-1431.

whether under the circumstances he had the power to grant the dispensation ; and they did not agree in their conclusion ; but some said that he could, and others affirmed the contrary. But since, according to the saying of S. Augustine, that which is certain is to be retained, and that which is uncertain is to be dropped, and it is a kind of sacrilege to dispute about the power of princes, and especially about the power of the Pope, . . . therefore no one must be advised, but rather must be altogether forbidden to procure even from the Pope a dispensation to contract marriage with a person with whose mother or sister he has sinned ; but if after contracting, and much more after consummating, such a marriage he has obtained a dispensation to remain with her, the matter must be left to the judgement of God, and not be condemned." ¹ It is important to notice that Martin V. did not in this case grant a dispensation to the man to marry the woman with whose sister he had sinned. No Pope dared to issue such a dispensation as that until seventy or eighty years later. The marriage had been already contracted and consummated before application was made for a dispensation, and the antecedent sin was not known to the world, and there would obviously arise great difficulty in taking public action on the basis of a secret sin, voluntarily confessed. But even so, the granting of a dispensation, permitting the man to continue to live in conjugal relations with his wife under such

¹ S. Antonin., *Summ. Theol.*, part. iii. tit. i. cap. xi. *De Affinitate*, edit. Veron., 1740, tom. iii. coll. 42, 43.

circumstances, was such an astounding stretch of the papal power, that it was with great difficulty that Martin made up his mind to accede to the man's petition for a dispensation. The theologians and canonists, who were consulted, differed among themselves as to the right of the Pope to issue such a dispensation. Some, no doubt, were too well taught in Scripture and tradition to allow such a thing to be possible; others, following Scotus's novel principles, were perhaps glad of the opportunity to urge their being put into practice. S. Antoninus was evidently shocked at what was finally done, and it was only his ultramontane views of the respect due to the Pope, which hindered him from protesting against the dispensation after it had been issued. "The matter," he says, "must be left to the judgement of God."¹ As we shall see, Martin's successor, Eugenius IV., refused, twenty or thirty years later, to act on the very doubtful precedent which Martin had set.²

¹ As will be seen in the next chapter (see below, pp. 116, 117, n. 2), another very eminent authority, Cardinal Parisio, who along with two other Cardinals was appointed to preside over the Council of Trent, did not hesitate to say that such a dispensation was null and void, and that a Pope, who should so dispense, would sin by doing so.

² Martin's grant of this dispensation, recorded by S. Antoninus, gave rise to, or at any rate helped to propagate, certain legends, of which one made Martin's dispensation seem far worse than it really was, and the other led people to believe that Martin had allowed a man to marry his deceased wife's sister, and so both legends tended to provide some sort of a justification for the abominations perpetrated by later Popes. On these two legends, see Appendix III. on pp. 177-185, below.

CHAPTER VII

THE TEACHING AND PRACTICE AMONG THE LATINS
AND AMONG OURSELVES FROM THE PONTIFI-
CATE OF MARTIN V. TO THE PRESENT TIME

COMING then to the pontificate of Eugenius IV., I proceed to show that at Rome, the centre of Latin Christendom, the view taken by the Fathers of the early Church concerning the Divine prohibition of the union of a man with his deceased wife's sister was still in force.

I will quote the words of a great theologian and canonist, the Dominican Cardinal de Turrecremata, who was a principal adviser of Pope Eugenius IV. (1431-1447), and of the Popes who succeeded Eugenius. In his commentaries on the *Decretum* of Gratian, the great mediaeval hand-book of the canon law, Turrecremata puts the question: "Whether the Pope can dispense in degrees of kinship prohibited by the law of God and indicated in the eighteenth chapter of Leviticus." He argues from St. Paul's treatment of the incestuous Corinthian that the Levitical prohibitions continued under the Gospel; for the canon law was not in existence in St. Paul's time. He says that the foundations of the opinions adverse to his own, which have been maintained by certain jurists, are vain and

false. "And," he says, "it is a wonderful thing that the Supreme Pontiffs speak with moderation of the power granted to them; yet certain pigmy doctors (doctorculi), without any true foundation, wish by flattering them to make them, as it were, equal to God." Further on he says: "No inferior can dispense from the law of his superior, unless this power has been granted to him: but we do not read anywhere that this power has been granted to the Roman Pontiff." Again, he says: "When the King of France, who is now reigning, was Dauphin, he petitioned that, his wife having died, he might be allowed to contract marriage with her sister. The matter was, by the command of the Lord Eugenius [that is, the Pope], discussed in our presence, to whom the case was committed, and the decision was that the Pope could not dispense."¹

Turrecremata was writing this passage about the year 1463, during the pontificate of Pius II. The King of France who was then reigning was Lewis XI. He succeeded his father, Charles VII., in 1461. As Dauphin, he had married the Lady Margaret of Scotland, the daughter of King James I. of Scotland. She had two sisters, the Lady Eleanor

¹ Turrecremata, *Commentt. super Decret.* part. ii. caus. xxxv. quaestt. ii. et iii. can. ii., edit. 1519, tom. ii. foll. 212, 213. Also in reply to the assertion that some Pope had "nostris temporibus" allowed an uncle to marry his niece, he replies, first, that he knows nothing of any such dispensation; and, secondly, he says: "Si ita aliquando fuerit factum per aliquem Summum Pontificem aut ignarum literis Divinis, aut excaecatum captivitate pecuniarum, quae pro talibus exorbitantibus dispensationibus solent offerri, aut ut complaceret hominibus, non sequitur quod potuerit juste facere. Ecclesia juribus et legibus regitur sive debet regi, non talibus actibus sive exemplis."

and the Lady Jane. The Dauphiness died in August 1445, and immediately after her death her two sisters arrived from Scotland at the French court. It was proposed that Lewis should marry one of these two sisters ; but the Pope refused to grant a dispensation, no doubt in consequence of the decision, the details of which are recorded, as we have seen, by Turrecremata. The Pope himself, Eugenius IV., died in February 1447. As it may be presumed that the Pope would have wished to grant any dispensation for which the "Eldest son of the Church" or his heir, the Dauphin, was petitioning, it seems clear that the petition was refused, because it was still held at Rome that marriage with a deceased wife's sister was forbidden by the law of God, and that the Pope could not dispense from the Divine law.

As we have seen, all through the Middle Ages a very marked distinction was drawn between impediments to marriage created by the law of God and impediments to marriage created merely by the law of the Church. From the eleventh century onwards the Popes, with ever-increasing frequency, had been granting dispensations from impediments which had been created by the Church and not by the law of God. But up to the end of the fifteenth century they consistently refused to permit marriages to be contracted by persons who were related to each other within what were called the Levitical degrees, that is to say, the degrees enumerated either explicitly or implicitly in the matrimonial code recorded in the eighteenth chapter of Leviticus ;

because marriages within all such degrees were regarded rightly as having been forbidden by the Divine law.

At last a Pope was found who was willing to cast Scripture and tradition and the law of God to the winds, and to give a dispensation to the King of Portugal, permitting him to marry the sister of his deceased wife. Who was this Pope? It was that monster in human form, Roderick Borgia, who when he was elected to the Papacy, assumed the name of Alexander, and is known in history as Alexander VI.

It would be quite impossible for me to give in this place details of the life of that scandalous person. It will be enough if I quote two sentences about him from *The History of the Popes*, written by Dr. Ludwig Pastor, Professor of History in the Roman Catholic University of Innsbruck, and translated into English by Father F. T. Antrobus of the London Oratory. I should say that at the beginning of this history there is printed a brief of Pope Leo XIII., commending and blessing the author and his undertaking. Dr. Pastor, speaking of Pope Alexander VI., says: "He who should have been the guardian of his time, saving all that could be saved, contributed more than any other man to steep the Church in corruption. His life of unrestrained sensuality was in direct contradiction of the precepts of Him whose representative on earth he was; and to this he gave himself up to the very end of his days."¹

¹ Pastor's *History of the Popes*, English translation, vol. vi. p. 140, 1908.

This, then, was the character of the man who was the first to introduce into Christendom a thing hitherto unknown, the granting of a dispensation allowing a man to live in an incestuous union with his deceased wife's sister. And it is the practice of a Borgia abomination of this kind which it is now proposed to sanction among communicants of the Church of England. The solemnization of such pretended marriages is not, indeed, to be forced upon our clergy, although, if they choose to solemnize them, they are to be treated as men who have done what they had a right to do. But the clergy *are* to be forced to give the Holy Sacrament of our Lord's Body and Blood to persons related to each other as brother-in-law and sister-in-law, who, at the registrar's office or elsewhere, have contracted a union with each other, which the State for its own purposes regards as marriage, but which the Church regards as incestuous, and which God has condemned as an abomination. Surely every loyal son and daughter of the Church of England will rise up and protest that this must not be. And surely every bishop, priest, and deacon will refuse to give the *Sanctum Domini*, the Holy Thing of the Lord, to persons living in open defiance of God's law.

The man to whom Alexander VI. granted this unprecedented dispensation was Emmanuel, King of Portugal. His first wife was Isabella, the eldest daughter of Ferdinand and Isabella, the Sovereigns of Spain. Soon after her death her husband, Emmanuel, became a suitor for the hand of her

youngest sister, Mary. Even Alexander at first shrank, or pretended to shrink, from granting a dispensation for such a marriage,¹ but he finally yielded, and the so-called marriage was solemnized in August 1500. Alexander had, four or five years before, granted another wholly unprecedented dispensation, allowing Ferdinand II., King of Naples, to marry Joanna, his father's half-sister. Altogether, this loathsome Pope, who himself lived a long life of debauchery, set himself to break down by his dispensations that reverence for God's holy laws about the impediments to marriage which had been maintained in Christendom for fifteen centuries.

And, when once the example had been set, it was followed. Alexander died in August 1503. He was succeeded by Pius III., who reigned for only twenty-six days; and on November 1, 1503, Julius II. became Pope, and in the very next month, if Pope Julius is to be believed,² he signalized the commencement of his pontificate by signing a Bull³ addressed to Henry, Prince of Wales, afterwards Henry VIII. of England, and to Katharine, another daughter of Ferdinand and Isabella, and widow of Henry's elder brother, Arthur, Prince of Wales, allowing this brother-in-law and sister-in-law to intermarry, notwithstanding the fact that, being

¹ See J. B. Morvan de Bellegarde, *Histoire Générale d'Espagne*, livre xvii. ch. iii. tom. v. p. 450, édit. 1723.

² Probably Pope Julius affixed a false date to his Bull, which does not seem to have been composed till 1504, and certainly was not sent to England till 1505.

³ The Bull is printed by Burnet (*History of the Reformation of the Church of England*, vol. i. p. 74, edit. Pocock, 1865).

related to each other in the second degree of affinity,¹ such a marriage was forbidden by the Divine law.

Thus within eight years three detestable dispensations had been issued by the Roman Court in connexion with the Divinely prohibited degrees of kindred and affinity. No wonder that God punished such repeated violations of His Holy Law by the chief Bishop in Christendom. No doubt those dispensations were the outcome of the paganized condition into which the Church, and especially the Papacy, had fallen. There were, indeed, other things crying out to Heaven for vengeance, besides these attacks on the sanctity of the law of marriage. But the dispensations were specially flagrant examples of the pagan spirit. And they surely had much

¹ It is right to say that the impediment of affinity only arises when the first marriage has been consummated; and the question whether Katharine's marriage with Henry's elder brother was consummated is a disputed question. But happily a discussion of the real truth of the matter is not necessary for the purpose of this argument. I am dealing with the dispensations issued by certain Popes, and Pope Julius acted on the supposition that consummation had certainly or at least possibly taken place. In the treaty between Henry VII. and Ferdinand of Spain (dated June 23, 1503), which arranged Katharine's second marriage, it is twice asserted absolutely and without any qualification that Katharine's first marriage was consummated (see Rymer, xiii. 78, 81). And Pope Julius made a similar assertion in a dispensation-brief which he sent to the Spanish Court in 1504. In the dispensation-bull which he sent to England in 1505 he declares that the marriage with Prince Arthur had *perhaps* been consummated ("*forsan consummavissetis*"). Both in the bull and in the brief Julius dispensed from the impediment of *affinity*, an impediment which presupposes consummation. If the Pope had proceeded on the supposition of non-consummation, he would have granted a dispensation from the impediment of *justitia publicae honestatis*; but there is no reference to an impediment of this latter kind in either the bull or the brief. The marriage, as it was arranged by Henry VII. and Ferdinand, and as it was sanctioned by Pope Julius, was undoubtedly based on a supposition in regard to the previous marriage with Arthur, which made it an incestuous union, forbidden by the Divine law, and therefore null and void from the beginning.

to do with the fact that, within the next fifty years, Rome had lost from her communion the most vigorous nations of Europe. So far as our own country is concerned, Julius's dispensation addressed to Henry and Katharine was, more than anything else, the direct cause of the breach between Rome and England, which was finally brought about by Paul III.'s Bull pretending to depose Henry VIII. and excommunicating all Englishmen who should continue to recognize him as their sovereign. Everybody must sympathize with poor Katharine, who probably knew nothing of the wickedness of the incestuous union, which was arranged for her by her father, Ferdinand, and her father-in-law, Henry VII., and the Roman Pontiff, Julius. And nobody can have much sympathy with Henry, who was mainly incited to press for a dissolution of his union with Katharine by his desire to marry Anne Boleyn. But technically he had the right on his side.¹ His marriage with Katharine was absolutely

¹ In saying that Henry had technically the right on his side, I refer to the invalidity of the dispensation granted by Julius II., and to the consequent invalidity of Henry's marriage with Katharine. If it be true that at an earlier stage in his life Henry had had sinful relations with Mary, the elder sister of Anne Boleyn, then his subsequent marriage with Anne was as invalid as his previous marriage with Katharine had been. I am afraid that there is very strong reason to believe that this was actually the case. The reader is referred to *The English Historical Review* (vol. v. pp. 546-550, 1890), where he will find a copy of a dispensation for Henry's marriage with Anne Boleyn, drafted in England, and registered at Rome in the *Camera Apostolica* by the express order of Pope Clement VII. The dispensation was, of course, only to be used when Henry's marriage with Katharine should have been annulled, if it ever should be annulled. The document sanctions Henry's marriage with Anne, notwithstanding any possible impediments, and among them is mentioned the impediment arising from affinity "ex coitu illegitimo in quocunque gradu, *etiamsi primo*." See also the letter from Henry VIII. to Knight, printed in *The English*

null and void from the beginning, and Pope Clement VII. ought to have made no difficulty in pronouncing a declaration of nullity.

In the Legatine Court held by Cardinals Wolsey and Campeggio, on June 25, 1529, Archbishop Warham of Canterbury confessed that, when this marriage was first proposed in the reign of Henry VII., he told that king plainly, "that the marriage seemed to him neither honourable nor well pleasing to God; adding further, that, because the said King Henry VII. appeared not much inclined to the marriage, he the said Deponent intreated him to persuade his son, Prince Henry, to protest that he would not take the Lady Katharine to wife, and that he should renew this protestation when he came to the crown; which also he, the said Deponent, believeth was made."¹ All this opposition of Warham took place, of course, twenty years before the divorce was thought of. And, moreover, in a conversation which Pope Clement VII. had with the Emperor Charles V. at Bologna in November or December 1529, he told the Emperor that there are "many things which make for the King; for *all the Divines are against the power of the Pope*, while of the doctors of the canon law, some² are against it: and those who are not con-

Historical Review for October 1896 (vol. xi. pp. 685, 686), and the letter from Sir George Throgmorton to Henry VIII., printed by J. S. Brewer in his Introduction to vol. iv. of his edition of *The Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII.*, pp. cccxxix., cccxxx., n. 1).

¹ Lord Herbert of Cherbury's *History of Henry VIII.* (Kennett's *History of England*, ii. 113, edit. 1706).

² By way of illustrating Pope Clement's statement, one might refer to the very distinguished canonist, Cardinal Parisio, who in the *Con-*

sider that the dispensing power can only be used for a very urgent cause, as, for example, to prevent the ruin of a kingdom." The Pope repeated this conversation to Sir Gregory Casale, Henry's agent at the *Curia*, in a talk which he had with him on

siliorum P. P. Parisii pars 4^{ta} (ed. Venet., 1593, *Consil.* lxviii.) maintains (§ 1, fol. 86^a) that marriage within the Levitical degrees is prohibited *de jure divino*; that (§ 13, fol. 86^b) the first degree of affinity as well as of consanguinity are prohibited degrees *de jure divino*; that (§ 15, fol. 86^b) a man is forbidden to marry a brother's widow, she being a sort of sister; that (§ 38, fol. 86^b) the Pope cannot dispense in such a case; that (§ 50, fol. 87^a) a Pope must not be obeyed in such a matter; that (§ 54, fol. 87^a) the person who acts on such a dispensation does not remain safe nor secure, since the dispensation is null and does not make the marriage cease to be sinful. Then, in answer to the actual cases of dispensation granted by Alexander VI. and Julius II. (§ 138, fol. 89^b), he says (§§ 251, 252, fol. 91^b): "The examples above adduced, in which it appears that Supreme Pontiffs have dispensed in the second degree unevenly [viz. a nephew to his aunt] and in the first transversely [viz. brothers-in-law to their sisters-in-law], by no means prove necessarily that the same is to be done in other like cases, since we must not judge by examples, but after the laws. Nor need all things done by predecessors be done by those who succeed them, for many things have been done by pontiffs which ought not of right to have been done." Again he says (§ 247, fol. 91^b) that marriage within a degree prohibited by the Divine law is not excused by the length of time during which the parties have lived together; that (§ 243, fol. 91^b) truth is more important than the avoiding of scandal; and that (§ 328, fol. 93^b) "such a precept [namely, the marriage code in Lev. xviii.] being Levitical and Divine, as all admit, was and is a moral precept, and therefore was and is a law of perpetual obligation, and was not abrogated under the new covenant." Now, who was the writer of all these lucid, and, morally speaking, admirable sentiments? Some persons may imagine that he was some Protestant heretic or Anglican defender of Henry VIII. By no means. He was selected by Pope Paul III., Clement's successor, on account of his great eminence as a canonist, to be the senior Cardinal Legate, who, along with the junior legates, Morone and Pole, was to proceed to Trent and there convoke, open, and preside over the Ecumenical Council to be assembled in that city. The three legates arrived in Trent on November 22, 1542, but found scarcely any bishops awaiting their arrival. At the end of seven months they still found themselves almost alone, and applied to the Pope to prorogue the Council, which he did in a Bull bearing date July 6, 1543. The first session of the Council did not take place till December 13, 1545; but Cardinal Parisio had died in the previous May.

Christmas Day, 1529,¹ and he had apparently told the same things to Doctor Bennet, another agent of Henry's, before Christmas. It is very noteworthy that, so many years after Alexander's dispensation to Emmanuel of Portugal and Julius's to Henry and Katharine, all the theologians in Rome still held the traditional doctrine of the Church that marriage with a sister-in-law is forbidden by God's law, and that the Pope cannot dispense in matters forbidden by God's law. We are assured of this fact by the testimony of Pope Clement himself.

If this was the universal opinion of the theologians in Rome, it is no wonder that in April 1533 the theologians in the Convocation of Canterbury decided by 244 votes (including proxies) to 19 that "it was unlawful to marry a deceased brother's wife," and "that such a prohibition of the Divine law could not be dispensed with by the Pope." About a month later, the same matter was debated in the Convocation of York by the theologians belonging to that synod, and it was decided by 49 votes to 2 that the Pope could not dispense in such a case. A few days later, in the Lady Chapel of the Augustinian Priory of Dunstable, the Archbishop of Canterbury (Cranmer), sitting in his Court, judicially pronounced the marriage of Henry and Katharine to have been null and void from the beginning. On June 29, 1533, Henry, in the presence of the Archbishop of York (Edward Lee), made a formal appeal, in regard

¹ See *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII.*, edit. Brewer, vol. iv. part iii. p. 2722.

to the matter of his marriage with Katharine, from the Pope to a General Council, and on the 2nd of the following December this appeal was ordered to be printed and affixed to every church door throughout England. It had been officially made known to the Pope by the English envoys, of whom Gardiner was the chief, on the 7th of November; but on March 23, 1534, the Pope, taking no notice of the appeal, pronounced Henry's marriage with Katharine to be valid and canonical.

This formal decision of Pope Clement VII. was in manifest opposition to the teaching of Scripture and the Fathers, and to the general tradition of the Catholic Church; and it has always been rejected by the Church of England, which adheres to the Catholic faith on this point as on others.

On the other hand, in the Roman Communion the decision of Pope Clement, though it cannot be regarded as an *ex cathedrâ* definition of the grave questions of faith and morals involved in it, has had a very great influence; and the marked difference, in regard to these questions, which may be observed between the teaching of later Roman theologians on the one side and that of the Fathers and most of the mediaeval Schoolmen on the other side, must, I think, be attributed mainly to that influence.

The Borgian dispensation, and the dispensation granted by Julius II., might have been ignored or explained away; but Clement's decision produced some very tremendous results. It led to the repudiation of the unhistorical claims of the Papacy

by the English Church and to the pretended deposition of Henry VIII. by Paul III., Clement's immediate successor, and to his excommunication of the English nation, because they continued to recognize Henry as their King; and, later on, after the retrogression under Mary, and the fresh repudiation of Papal claims under Elizabeth, there followed on in natural sequence Paul V.'s Bull, *Regnans in Excelsis*, excommunicating and deposing Elizabeth, and absolving the nation from its allegiance to her. All these great events issued out, as it were, from Clement's original decision on Henry's marriage with Katharine, and they established a chasm between England and Rome, which made it difficult for the adherents of the Roman Church to come back to the scriptural and Catholic truth about the Levitical degrees, as it had been maintained by earlier Popes, such as Damasus, and Gregory the Great, and Innocent III., and Eugenius IV.

The Council of Trent spoke in a very uncertain way about the subject which has been engaging our attention. It rejected the principle on which the Church had relied for 1500 years—the principle, I mean, that no one here on earth has the power to issue a dispensation permitting Christian people to marry within the divinely prohibited degrees. But it left in uncertainty the question as to what the degrees were in which dispensations could be granted, and in one passage of its decree of reformation, it seems rather to imply that no dispensation could be granted, permitting a brother-

in-law to marry a sister-in-law. Let me explain this matter a little more fully. In its third doctrinal canon touching marriage, speaking of the "degrees of consanguinity and affinity, which are set down in Leviticus," the Council lays down that "if any one should say . . . that the Church cannot dispense in some of those degrees . . . let him be anathema." This evidently implies that dispensations can be granted in some Levitical degrees, and cannot be granted in others; but which of these degrees belong to one category and which to the other is left in the dark. In the fifth chapter of the disciplinary decree touching the reformation of marriage, the Council says: "A dispensation shall never be granted in the second degree, except between great princes and for a public cause." In order that this passage may be understood, the reader must be again reminded that the degrees of kindred and affinity are not counted in the Roman Church, as they were in the early Church, and as they still are in the Eastern Church, and as they are among ourselves. We count a sister-in-law as being related to her brother-in-law in the *second* degree of affinity; but the Latin canonists count her as being related to her brother-in-law in the *first* degree of affinity. Among the Latins, the list of a man's relations by affinity in the second degree includes his uncle's wife and his wife's aunt, his first cousin's wife and his wife's first cousin, his nephew's wife and his wife's niece. Some of these we should reckon in the third degree, and some in the fourth. It follows that, while the

Council forbids a dispensation to be granted in these more distant degrees, "except between great princes and for a public cause," it says not a word about the possibility of a dispensation being granted in the first degree, which, as I have said, includes brothers-in-law and sisters-in-law. It does not expressly prohibit dispensations being granted in those degrees, but for very shame it does not allude to the possibility. The vagueness of these Tridentine decrees has led to their being interpreted in different ways. The great canonist, Prosper Fagnanus, declares that the Council "clearly enough insinuates that in the first degree a dispensation is never to be granted." But the precedents set by Alexander VI., Julius II., and Clement VII. have in the end won the victory, and dispensations are now shamelessly granted by the court of Rome for brothers-in-law to marry their sisters-in-law, and for uncles to marry their nieces, and for nephews to marry their aunts. All the restrictions of the Council of Trent have been thrown overboard, and practically dispensations can be got by paying the appointed fees, not only by great princes for some public cause, but by any ordinary person for purely domestic or personal reasons.¹ The whole state of things is shocking to a well-informed Christian conscience. And all this miser-

¹ I do not wish to imply, by what I have said in this sentence, that the granting of dispensations of this kind to great princes for some public cause is anything but detestable ; but at any rate the restrictions imposed by the Council of Trent made the granting of the dispensation a very exceptional thing ; whereas, by doing away in practice with the restrictions, the floodgates have been opened, and the licences to commit incest have become common.

able confusion had its origin in the holy law of God being trampled underfoot by that appalling monster, Alexander VI.

Of course the Eastern Church repudiates these abominations with horror. It has a very large table of prohibited degrees, which naturally includes the particular case with which we are specially concerned, and it grants no dispensations in this matter.¹

I have already, in the first chapter of this book, drawn attention to the law of the Church of England since the Reformation in regard to the Prohibited Degrees, as it is set forth in the Table of Kindred and Affinity, and in the 99th Canon of 1603; and I have pointed out that the prohibitions of the Table were not new prohibitions, but merely declared the ancient law of the English Church from the time of her foundation in the sixth century. The Church of England, during the whole course of her long history from 597 to 1911, has never recognized the validity of the marriage of a man with his deceased wife's sister, and has never regarded persons living together in an in-

¹ See the "Statement as to the Marriage Law in reference to the Prohibited Degrees in the Greek Church," by the Rev. W. Palmer, Fellow of Magdalen College, Oxford, printed in Dr. Pusey's *Marriage with a Deceased Wife's Sister*, pp. 57-73, Oxford, 1849. The Rev. W. Palmer was a brother of the first Lord Selborne. In Vacant and Mangenot's *Dictionnaire de Théologie Catholique* (vol. i. p. 523) Dom Parisot writes the article entitled *Affinité, empêchement de mariage chez les Orientaux*, and, speaking of the Greek Church, he says: "La base de la législation matrimoniale dans les anciennes Églises fut le code du Lévitique." The Syrian Jacobites, the Armenians, and the Nestorians seem to have the same basis for their law about matrimonial impediments.

cestuous union of that kind as admissible to the Holy Communion.

And the law laid down in the 99th Canon of 1603 and in the Table was not a dead law, known only to antiquaries. It was a law which was continually enforced by the Courts. So far as the ecclesiastical Courts are concerned, reference may be made to the case of *Aughtie v. Aughtie*,¹ and to that of *Faremouth v. Watson*,² and to *Blackmore v. Brider*,³ and to *Chick v. Ramsdale*,⁴ and to *Ray v. Sherwood*.⁵ And so far as the civil Courts are concerned, one may refer to the case of *Hill v. Good*,⁶ and to that of *Harris v. Hicks*,⁷ and to *Collet's case*,⁸ and to the case of *Butler v. Gastrill*,⁹ and to that of *Brownsword v. Edwards*,¹⁰ and to *Faremouth v. Watson*,¹¹ and to *Chick v. Ramsdale*,¹² and to *Sherwood v. Ray*.¹³ And the decisions of the Courts uniformly adopted the same rule, and uniformly held these marriages to be incestuous.¹⁴

But as we have seen, four years ago, in 1907, an Act of Parliament was passed which, so far as the State was concerned, legalized marriage with a deceased wife's sister "as a civil contract." Parliament seemed to go out of its way in its care to

¹ See 1 Phillimore, 201.

² See 2 Phillimore, p. 359.

³ See 1 Curtis, pp. 173, 193.

⁴ See 2 Salkeld, p. 548.

⁵ See Gilbert's *Equity Cases*, p. 159.

⁶ See 2 Vesey, Sen., p. 248.

⁷ See 1st Curtis, p. 44.

⁸ On the change which was wrought by Lord Lyndhurst's Act in 1885, what it was, and what it was not, see Appendix IV. below, on pp. 186-188.

⁹ See 1 Phillimore, 355.

¹⁰ See 1 Curtis, 34.

¹¹ See Vaughan, p. 302.

¹² See Sir Thomas Jones, p. 213.

¹³ See 1 Phillimore, p. 355.

¹⁴ See 1 Moore, p. 353.

avoid trenching on the domain of the Church. Marriage of this kind was legalized purely "as a civil contract." Parliament implied that marriage may have other aspects. It knew perfectly well that marriage is an ordinance of the Church, and an ordinance which the Church recognizes as of Divine origin, and as being regulated by laws, some of which she regards as Divine. All this is left intact by the new statute. The Church has, of course, no right to express any opinion as to whether in any country this or that marriage, regarded as a civil contract, is or is not legal. But she has an indefeasible right to instruct her children as to whether such marriages are in accordance with, or in opposition to, the law of God. For 1300 years she has told her children that marriage with a deceased wife's sister is contrary to the Divine law, and is therefore null and void in *His* sight and in *hers*; and she has enforced this opinion by refusing to give the Holy Communion of our Lord's Body and Blood to the partners in such a union—a union which she declares to be incestuous. Neither in the year 1907 nor since 1907 has she made any announcement that she has changed her view as to the wickedness and nullity of these marriages. She has not abrogated the 99th Canon of 1603, which declares these marriages to be incestuous and void; nor has she abrogated the 109th Canon of the same code, which declares that "notorious offenders" "by incest" "shall not be admitted to the Holy Communion till they be reformed."

But the Dean of Arches, Sir Lewis Dibdin, in the case of *Banister and Wife v. Thompson*, has, in opposition to all previous decisions of the Courts of the Church of England, and in defiance of the express definition of the 99th Canon, and of the express requirement of the 109th Canon, admonished Canon Thompson for having repelled from Holy Communion two of his parishioners who were living in a union which the canon declares to be incestuous and void, and he has further admonished Canon Thompson to refrain from similar acts in the future.

It is of the highest importance that we should study the process of reasoning by which the Dean of Arches arrived at the conclusion that it was his duty to take this amazing action. It will therefore be necessary that I should quote a passage from his judgement, which will make the process of his reasoning clear. The passage runs thus: "For the purpose of the present case it is only necessary to consider one cause of repulsion. An intending communicant who is an open and notorious evil liver, so that the congregation be thereby offended, and who has not openly declared himself to have truly repented and amended his naughty life so that the congregation may be satisfied, is not to be suffered to be a partaker of the Lord's Table. The words 'open and notorious evil liver' are not precise, but I do not think they are obscure. By an evil liver is intended a person whose course of life, as distinguished from some particular action, is in conflict with the moral

code of Christendom. That our law recognizes in matters of morals the common consent of Christendom is especially the case with regard to marriage questions. Thus a Mormon marriage, though contracted by persons domiciled in the Mormon State of Utah, was refused recognition in England because polygamy is inconsistent with marriage as understood in Christendom (*Hyde v. Hyde and Woodmansee*). On the other hand, a marriage between a man and his deceased brother's widow, the parties being domiciled in Italy, and a dispensation having been obtained, was recognized in England because such marriages, though unlawful here, are not universally condemned¹ by the general consent of Christendom (*re Bozzelli's Settlement*)".²

It appears, therefore, that the Dean of Arches, sitting as Judge in the Provincial Court of the Province of Canterbury, and acting therefore as the representative of the Archbishop of Canter-

¹ It would seem hardly necessary to point out that, when the Dean of Arches says that "such marriages . . . are not universally condemned by the general consent of Christendom," he does not mean to suggest that these marriages are universally *approved* by the general consent of Christendom. Not only does the English Church regard such marriages as incestuous and void, but the same view is held by the Eastern Church; and, when such marriages are contracted without a papal dispensation, all the churches of the Roman Communion also regard them as incestuous and void. When the Bill for legalizing them in England was being debated in Parliament in 1896, Pope Leo XIII. directed Cardinal Vaughan to use every influence to induce Romanist members of Parliament to vote against the Bill, because it violated the common law of the Latin Communion (see *C.Q.R.* liv. 90, 91). It is only in the Protestant countries of Europe and in some of the States in America and in some British Colonies, and since 1907 (as a civil contract) in the United Kingdom, that these detestable unions are deemed to be perfectly legal and valid marriages.

² *The Law Reports*, Probate Division, 1908, p. 385.

bury, in order that he may decide whether a marriage of this kind is or is not incest, enters on no investigation as to the teaching of Holy Scripture and tradition, throws overboard the Table of Prohibited Degrees, which is authorized by the 99th Canon of 1603 as the Church of England's exposition of what sort of marriages she regards as incestuous, pays no attention to the unanimous decisions of all previous judgments of the Courts of the Church of England, and of other high Courts of the realm, and adopts as his criterion what he calls "the common consent of Christendom." And he does this, not when he is considering a case having to do with the division of property or with other worldly matters, but when, as the representative of the Archbishop, he is considering whether the Holy Sacrament of the Body and Blood of our Lord is to be given to persons who are living as man and wife in a union which the canons of our Church denounce as an incestuous union. I cannot find words to describe my horror at the insult which is offered to Almighty God, and to my mother, the Church of England, and to the holy see of Canterbury, by such a proceeding. It cuts away the ground on which the Church of England has stood for nearly 400 years. Ever since the year 1534 the Church of England has maintained against the largest part of Christendom—I refer to the communion of the Church of Rome, which on this matter has fallen from her ancient integrity, and has accepted the Borgian abominations intro-

duced by Alexander and Julius—I say that ever since the above-mentioned year the Church of England has maintained against that great communion a most righteous protest, and as regards the prohibited degrees, she *has* continued and *does* continue to adhere to the teaching of Holy Scripture, and to the practice of the whole Catholic Church during the first 1500 years of the Church's existence. The Church of England certainly has not taken "the common consent of Christendom" in these degenerate days, as the criterion of her faith and practice; and it is a disgraceful thing that one who occupies the high position of Dean of Arches should attempt, by the application of a principle which the Church of England has implicitly repudiated, to revolutionize the whole position of the Church, in whose name he speaks.

Besides, what will the adoption of this new criterion lead to? Large parts of Christendom now allow divorce for the most trivial reasons. Large parts of Christendom allow uncles to marry their nieces, and nephews to marry their aunts. Large parts of Christendom are in a semi-paganised condition. And are we to be compelled to tear up our own canons and traditions and the Holy Scriptures themselves, and to confine ourselves to enforcing on the members of our body that small and ever-diminishing residuum which is common to all those nations which still claim to be regarded as Christian nations? If we do adopt this principle we shall certainly deserve soon to be extinguished altogether. "If the salt have lost its savour, where-

with shall it be salted? it is thenceforth good for nothing, but to be cast out and trodden under foot of men."

But I do not believe that we of the Church of England shall adopt this principle. We shall repudiate it not only in word, but in action and practice. Our bishops and priests will continue to refuse Holy Communion to persons living in incest. Our lay-people will support their clergy in carrying out the discipline of the Church in this matter; and, where they see any of the clergy remiss, they will bring pressure to bear upon them, or complain of them to the bishop.

It is a good omen of the future that a resolution was carried, *nemine contradicente*, on July 7, 1910, at a meeting of the Representative Church Council, which runs thus: "That this Council desires to record its emphatic opinion that any assumption that the State can by parliamentary legislation practically dictate the terms of admission to Holy Communion, is a position which cannot be accepted by the Church."¹

God grant that we all, whether we belong to the clergy or to the laity, may be loyal and staunch, so that we may hand on the Church to our children, certainly no worse, but rather, by the help of God, better, than it was when we received it from our fathers.

¹ *The Guardian* for July 15, 1910, p. 970.

CHAPTER VIII

WHAT THE CHURCH OF ENGLAND OUGHT TO DO AT THE PRESENT TIME IN REGARD TO PERSONS WHO HAVE CONTRACTED MARRIAGE WITH THEIR DECEASED WIFE'S SISTER

• In the preceding chapters the main purpose of my argument has been to show that the doctrine and discipline of the Church of England in regard to the nullity of a marriage contracted by a man with his deceased wife's sister, rests upon the sure warrant of Holy Scripture, and on the teaching and practice of the whole Catholic Church during the first fifteen centuries, and on the teaching and practice of the Eastern and Anglican branches of the Catholic Church up to the present time.

The upshot of all that I have written is that these marriages are forbidden by the law of God, a law which in reality binds all men, but which binds those who belong to God's household, the Church, with a very special degree of obligation.

It is a great comfort to me to be able to quote two passages from a charge delivered by the present Bishop of Winchester (Dr. E. S. Talbot) in 1907, when he was Bishop of Southwark, which, if I understand them aright, set forth the same con-

clusion in regard to this matter as that which commends itself to my own judgement. The Bishop says : "The Church's position is perfectly plain, and is seen to rest, not upon the canons of 1604 only, but upon the constant principles of the Christian law. If there is a Christian law of marriage at all, in any definite and historical sense, this prohibition is part of it. Such a marriage *is not allowed by God's word*,¹ according to our best understanding, and the Church's witness of what that word implies."²

A little further on in the same charge the Bishop says : "The Church of England must be true to her own rule and standard. The change in the law of the State has not been made with any concurrence on her part. Nor would that concurrence, if asked, have been given. I speak with respectful remembrance of the dissent of some good men, when I say that the living voice agrees with the inherited letter, and that the general conscience of attached Churchmen pronounces against such change. The Church would neither feel free to make it : nor can she conceive that the change made by Parliament is either a step in advance, or a matter indifferent, in regard to the relations between men and women ; but must hold it to be a step backwards, and in disintegration. We must make plain, and keep clear, before our people what we hold, and why. It will bring upon us

¹ The italics are mine.

² *The Church's Stress*, by Dr. E. S. Talbot, Bishop of Southwark, pp. 22, 23.

scornful attack, but incidentally we may gain, in so doing, an increase in intelligent understanding, and loyal acceptance, of the obligations of Churchmanship."¹

Taking these two passages together, and interpreting one by the other, it becomes clear that the main reason why the Bishop denies that the Church would "feel free" to make the change in her rule about the prohibited degrees, is because such a change "is not allowed by God's word," or, in other words, because marriage with a deceased wife's sister is forbidden by the Divine law. The law of God not only binds individual members of the Church, but it binds the Church herself.

But now comes the question—What measures ought the Church to take in order that in deed as well as in word she may "be true to her own rule and standard," or, rather, may be true to *God's* rule and standard? Is it enough that she should "urge all loyal Church people to abstain from such marriages, and *advise* officers of the Church to abstain from solemnizing" them? Such a course might be sufficient, if the Divine laws about the prohibited degrees were mere counsels of perfection, instead of being, as they are, peremptory laws, every breach of which laws is so "abominable"² in the judgement of God, even when committed by ignorant Hivites and Perizzites and other heathen nations, that on account of such breaches "the land" in old days "vomited out her inhabitants."³

The rule of the Church of England is perfectly

¹ *Op. cit.*, pp. 24, 25.

² Lev. xviii. 30.

³ Lev. xviii. 25.

clear. "All marriages made within the degrees prohibited by the laws of God, and expressed" in the Table, "shall be judged incestuous and unlawful, and consequently shall be dissolved as void from the beginning."¹ These marriages are in the eyes of God and of the Church no marriages at all. Persons who go through the form of contracting them, are living, not in the holy estate of matrimony, but in the abominable sin of incestuous fornication. Is, then, the Church "true to her own rule and standard," if she merely *advises* her officers to abstain from solemnizing them? Surely the least she can do is to *require* her officers with all authority to refrain from the profane sacrilege of using the words of her holy service in the solemnization of a mock marriage, and in the pronouncing of God's benediction over the perpetration of a loathsome sin.

That this is the general view of all orders of instructed members of the Church of England was made evident by the Resolution which was passed by the Representative Church Council on July 8, 1909. That Resolution ran thus: "That, seeing that all marriages within the prohibited degrees of affinity (whether allowed by the law of the land or not) are wrong, as being contrary to the moral rule of the Church of England and the principles implied in the Holy Scripture as interpreted by it, the use of the Prayer-book service for the solemnization of holy matrimony in respect to any such marriages *is most strongly to be reprobated.*" The

¹ Canon 99 of 1603-4.

voting on this Resolution was taken by orders, and resulted as follows :¹—

Bishops . . .	15	Ayes . . .	4	Noes
Clergy . . .	106	„ . . .	8	„
Laity . . .	103	„ . . .	12	„

But again, is the Church “true to her own rule and standard,” if she merely *urges* her people to abstain from such marriages? By all means let her urge such abstention in season and out of season, “*opportune, importune*”; but what if they rebel, and in the registrar’s office or elsewhere contract an incestuous union? Here again the rule of the Church of England is perfectly clear. “If any offend their brethren . . . by . . . incest . . . such notorious offenders shall not be admitted to the Holy Communion till they be reformed.”² Any other course of action is inconceivable to a Christian who realizes how hateful is the sin of incest in the sight of God, how awful is the judgement in store for those who live in incest, and what catastrophes will assuredly fall, sooner or later, on a Church which casts her pearls before the swine, and gives that which is holy to the dogs.

Surely suspension from Holy Communion until the offenders are reformed is the very least punishment that the Church can inflict on persons living in incest. The early Church would have decreed in addition long years of penance. I do not suggest that the primitive discipline should be revived. But members of the Church of England have a

¹ See *The Guardian* for July 14, 1909, pp. 1130, 1131.

² Canon 109 of 1603-4.

right to demand that the very mitigated modern rule of their Church shall be carried out.

It was very truly observed by the Bishop of Carlisle,¹ at the meeting of the Representative Church Council mentioned above, that "if the Council declared that these marriages were morally wrong according to the rule of the Church, they must go a step further and forbid the Holy Communion to those who contracted them."² This further step was not before the Council; but it obviously follows as a necessary corollary to the Resolution which the Council passed.

More than sixty years ago, Mr. Keble pointed out the obligation of refusing Holy Communion to persons entangled in these incestuous unions, which would devolve upon the clergy if such unions should be legalized by Parliament. In the year 1849 he wrote thus: "I hope that we shall in good time speak out, and tell our statesmen and lawyers that no Act of Parliament nor Provincial Canon nor anything short of a true Œcumenical Council³ can possibly set us free from the obligation we feel to regard the marriage of a man with his wife's sister, and all others like unto it, as prohibited by Scripture under the penalties of incest. So that for no religious purpose—Communion, burial, or the like—can we ever recognize such a connexion as a marriage. By God's help, 'we will not defile ourselves in any of these things: for in all these things

¹ Dr. J. W. Diggle.

² See *The Guardian*, u.s.

³ It is, I hope, permissible to hold that God would never allow "a true Œcumenical Council" to make itself responsible for such an action as is here hypothetically attributed to an assembly of that kind.

the heathen were defiled. We will keep God's ordinance, that we commit not any one of these abominable customs that were committed before us ; and that we defile not ourselves therein : He is the Lord our God.'"¹

And similarly, eleven years later, Dr. Pusey wrote : " It is not proposed that the Church should change her law, and, if the Church would change it, she could not change the law of God. By the law of the Church, the clergy are bound not to give Communion to those openly living in a union contrary to God's word, and which the Church of England has declared to be so. The clergy then dare not give it, lest they make themselves partakers of others' sins. The law probably would not protect them. But they must obey God rather than man." "²

In these passages Mr. Keble and Dr. Pusey,

¹ *Against Profane Dealing with Holy Matrimony in regard of a Man and his Wife's Sister*, p. 33, edit. 1849.

² *God's Prohibition of the Marriage with a Deceased Wife's Sister not to be set aside by an inference from a restriction of Polygamy among the Jews*, p. 44, edit. 1860. Dr. Pusey to the end of his life held that these marriages were prohibited by the Levitical law, and that that prohibition was binding on the Church. On May 16, 1882, exactly four months before his death, he wrote to Lord Dalhousie on the subject. Among other things he said : " In regard to your Lordship's question whether I believe marriage with the deceased wife's sister to be prohibited by the Levitical law, I have no doubt that it is prohibited by Leviticus xviii. 6. The literal translation of the words is, 'None of you shall approach to any flesh of his flesh to uncover their nakedness, I am the Lord.' They were universally understood to include the near relations of her who by marriage had become one flesh with her husband. This continued on from the earliest times of which we have any notice, before the Council of Nice, to the dispensation of Alexander VI. (Borgia) at the close of the fifteenth century. For 1500 years the unlawfulness of this marriage was unquestioned, until it was violated by the dispensations of a Pope, stained by almost every vice." (See Liddon's *Life of Pusey*, vol. iv. p. 371.)

speaking words of truth and soberness, have pointed out to us the path of faithfulness and courage along which we now have to walk. The parliamentary change in the civil law, the shadow of which they descried on the distant horizon, has now become an actually accomplished fact, and it remains for us to maintain within the communion of the Church the strict obligation which lies on members of the Church to obey with entire loyalty the unchanging laws of God.

But it will be argued : It is so easy for people to be misled in this matter. We must deal "tenderly" with them. They hear of dispensations, allowing people to contract these marriages, being granted by the Roman Curia ; and they hear that dissenters belonging to different denominations deny that these marriages are forbidden by God, and so they are led astray. But why, belonging as they do *ex hypothesi* to the Church of England, do they look in the wrong places ? The Church of England speaks in this matter with no uncertain voice. For thirteen centuries she has declared that these unions are incestuous, and are not marriages in the sight of God ; and she makes the same declaration still. And she can prove to demonstration that her teaching and practice agree with Scripture and with the tradition of the Universal Church. Why are we to deal "tenderly" ¹ with people who either ignore

¹ Of course, in one sense true followers of our Lord would feel tenderly towards all sinners, and most especially towards sinners who may be thought to have sinned in ignorance. But such tenderness must not take the form of allowing them to go on breaking the law of God. That would be a very cruel sort of tenderness, from which may God preserve us.

or repudiate the teaching of their own Church, and prefer to fashion their lives in such a supremely important matter as marriage by the unscriptural and un-Catholic fancies of bodies with which they are not in communion? Besides, we must consider the needs, not so much of this or that individual, as of the whole body of Church people. The State permission to contract these marriages constitutes for the great mass of Church people a grave danger. Their one hope of realizing both the sinfulness of such marriages and their invalidity is by their seeing that Holy Communion is consistently refused by the Church to offending parties who refuse to separate. How will they ever learn to believe that such marriages are abominable in the sight of God, and that they pave the road to hell, if they see persons living in incest admitted to the Lord's Table?

To communicate a person who is living in incestuous fornication is in effect to grant to him a dispensation to continue in his sin. And who has given authority to any priest or bishop or synod of bishops to grant such dispensations? The whole proposal seems to me to be blasphemous and revolting. And I cannot conceive that it could be carried out on any considerable scale without splitting up the Church of England. And assuredly the whole responsibility for such a catastrophe would rest on the innovators.

One would have thought that the whole story of permissions to marry within the Divinely prohibited degrees in the communion of the Church of Rome

would be enough to frighten every other part of the Church from touching this accursed thing.¹ It begins with the dispensations granted by Alexander VI. for one man to marry his aunt and for another to marry his deceased wife's sister. Then follows the dispensation granted by Julius II. for our Prince Henry to marry his elder brother Arthur's widow, and thirty years later the formal ratification of that dispensation by Clement VII. Later still comes the Tridentine canon anathematizing those who deny that dispensations can be granted in some of the Levitical degrees, and also the Tridentine decree, which, making no mention of the possibility of dispensations being granted in the first degree, ordains that "a dispensation shall never be granted in the second degree, except between great princes and for a public cause." One might have expected from all this that these dispensations would be very rarely issued. And for a time it was so. But the following quotation from the Pastoral Letter addressed to his diocese by Cardinal Guibert, Archbishop of Paris, at the beginning of Lent in 1877, shows how

¹ One terrible result of the modern Roman teaching is that, the Levitical code having been practically shelved, no one knows for certain what the Divine law allows and what it forbids. A number of very leading Romanist theologians hold that, so far as the Divine law is concerned, there is nothing to prevent a man from marrying his step-mother or his mother-in law or his step-daughter or his daughter-in-law. This view is taken by Cajetan, Navarrus, Henriquez, Sanchez, Pontius, De Castro Palao, Hurtado, Gonzalez, Tamburini, Gonet, Caramuel, the Salmanticenses, Elbel, Krimer, Marin, Tournely, Schmalzgrueber, Antoine, Ferraris, Gousset, Scavini, Ballerini, &c. Happily there are others who hold as a pious opinion that such marriages are forbidden by the Divine law ; but nobody knows anything about the matter for certain. Similar observations might be made about the marriage of brothers with sisters.

this upas tree has from a small seed grown up and spread its branches abroad. The Cardinal, speaking of his own diocese, says: "Marriages between uncles and nieces, and between brothers-in-law and sisters-in-law, which used to be unknown, or almost unknown, have multiplied in these latter times to a degree which saddens us, inasmuch as it is a grievous weakening of the principles of the Christian faith."¹ He goes on to acknowledge that the state of things is worse in the rest of France than in Paris.

If I may in all humility express my own opinion, I would venture to say that what is really needed is that the Bishops should address a Pastoral Letter to the Clergy and Laity of the Church, explaining what the law of the Church is on this matter, and how completely that law is justified by Scripture and Tradition, and making it quite clear that, while these marriages are valid as civil contracts, they are not marriages in the eyes of God and of His Church, but rather incestuous unions which necessarily debar the parties, so long as they continue in their sin,

¹ *Mandement de S. Ém. le Cardinal-Archêvêque de Paris pour le Carême de 1877*, quoted in Smith and Cheetham's *D.C.A.* (vol. ii. p. 1729, note f, s.v. *Prohibited Degrees*). How terribly rapid has been the moral declension in France, may be gathered from a fact mentioned by Lord Hatherley in his second letter to Dean Trench. He says: "As late as in 1723, the Parliament of Paris, on an *Appel comme d'Abus*, in the Marquis of Sailly's case, declared his child by a deceased wife's sister illegitimate, notwithstanding the marriage had been under a dispensation from the Pope, on the ground that the Pope could not dispense with God's law." See Lord Hatherley's *Vindication of the Law prohibiting Marriage with a Deceased Wife's Sister*, p. 59, edit. 1869. Evidently, in 1723 marriage with a sister-in-law was impossible in France, because the State still held to the Catholic teaching that such marriages were forbidden by God's law.

from being admitted to Holy Communion. If such a letter were ordered to be read in every pulpit, it would be a great act of faith and of charity which would glorify God, win respect from all thinking people, tend to deter the faithful from entering into these sinful connexions, and fill instructed Churchmen generally with heartfelt gratitude.

In what I have written I have discussed this matter from the point of view of Divine revelation, because that is the point of view which must occupy almost the whole field of consideration when the matter under debate is what the action of the Church should be. When the question was before Parliament, and the action of the State was being considered, it was natural that the social expediency or in expediency of the proposed change should come very much to the front in the debates. It is impossible for me to discuss this side of the matter adequately without exceeding the limits which, for various reasons, I have set to the length of this book. But I should like to quote the words of Lord Chancellor Hatherley, who in politics belonged to the Liberal party. They occur in a letter dealing advisedly with the social as distinct from the religious aspects of the question. The letter was addressed in February 1861 to Dr. Trench, then Dean of Westminster, afterwards Archbishop of Dublin. Towards the close of the letter Lord Hatherley says: "I have taken mere heathen ground in this letter. But by all the joys of that tie of real brotherhood which binds us to the sister of our wife ; by all the aspirations of a high

and holy morality, be the man's religious faith what it may ; by all the horrors of an ever-deepening, hopeless sinking into the abyss of cold, cynical indifference as to the purity of our national life, I implore all men to aid us in resisting the proposed change of the home life of England. A friend smiled when I said—'I would rather hear of the landing of 300,000 French at Dover than of the passing of this Bill.' It was no exaggeration of my feelings. We can and should repel an external foe ; but inward decay and rottenness will destroy us, sap our morals, and our only life worth having is at an end."¹

These fervent words of Lord Hatherley express, I think, the feelings of most thoughtful members of the Church who have been led to consider this question. But we have passed now to a different stage in the great discussion. For our sins, the law of the State has been altered, and, as civil contracts, these marriages have been legalized. It now remains for the Church, in the fulfilment of her duty towards God and as the outcome of her love for the nation, to do her utmost to keep her own people free from these abominations. For this purpose the first and most important step is that she should carry out her existing laws, which for 1300 years—that is to say, during the whole course of her existence—have in this matter remained in substance unchanged. How glorious it would be if, in defence of the holy law of God, she had

¹ Lord Hatherley's *Vindication of the Law prohibiting Marriage with a Deceased Wife's Sister*, pp. 31, 32, edit. 1869.

to endure the spoiling of her goods and the loss of her social status ! What a Pentecostal outpouring of the Holy Ghost would assuredly follow on such a glorifying of the Name of Christ. At present the judgements, which overwhelmed the offending heathen of old, are hanging over our beloved country. It is for the Church, the Spouse of the Crucified Saviour, to keep herself pure, whatever the cost may be, and thus, like the ten righteous men in Sodom, obtain from God deliverance for the nation. May He in His mercy enable us all to rise up to the task to which He calls us.

APPENDIX I

ON THE MEANING OF THE SIXTY-FIRST CANON
OF THE COUNCIL OF ELVIRA, IN REPLY TO
AN ARTICLE IN THE "CHURCH QUARTERLY
REVIEW" (see p. 65, n. 2)

I HAVE assumed in the text that it is presupposed in the 61st canon of Elvira, as it is demonstrably presupposed in the 78th of S. Basil's canons,¹ that when a man who has married his deceased wife's sister desires to be restored to Communion, the separation of the guilty parties must precede admission to penance.

It will, I think, be admitted by those who have studied the matter, that this assumption has been very commonly made by scholars who have had occasion to comment on this Spanish canon. Within the last four years, however, its tenableness has been challenged by my friend Mr. C. H. Turner of Magdalen; and all students of Church History, and more especially all students of the early Canon Law of the Western Churches, know what very great authority rightly attaches to any pronouncement made by Mr. Turner on points connected with either of those subjects. However, I have read his article on "Irregular Marriages and the Earliest Discipline of the Church,"²

¹ See pp. 59, 60, above.

² *Church Quarterly Review* for October 1908 (vol. lxxvii. pp. 151-167).

and have, I hope, learnt much therefrom ; but on the particular point which I am now discussing, I remain unconvinced, and it seems right, and indeed necessary, that I should state the reasons for my dissent.

But first, I ought to mention that Mr. Turner fully allows that separation before admission to penance was the practice of the Eastern Church in the first quarter of the fourth century,¹ and that it was also the practice in the West at the beginning of the sixth century, if not earlier;² and he adds: "When we find then that the canon of Elvira fixes five years' exclusion from Communion as the ecclesiastical penalty for contracting such a union, we should have good ground, upon contemporary Eastern and later Western evidence, for interpreting this exclusion for five years as additional to, and not as a substitute for, the dissolution of the marriage tie; nor is it strange that this interpretation has often, perhaps habitually, been given."³ It is clear, therefore, that, in Mr. Turner's opinion, the mere fact that there is no explicit mention made of separation in the canon of Elvira in no way bars the belief that such separation is presupposed. If it were not for other reasons which seem to him conclusive, Mr. Turner would allow us to believe that the discipline, which he admits to have been in force in the East within the first quarter of the fourth century, extended also to Spain in the farthest bounds of the West, even before the Peace of the Church.

What, then, are these other reasons?

I will begin with the train of reasoning on which Mr. Turner evidently lays the chief stress; and in order to do justice to it I must quote his words at some length. After setting forth an argument to which he attaches less importance, he writes as follows: "But it is not needful to lay much stress upon considerations of this kind. The conclusion

¹ *Op. cit.*, p. 162.

² *Op. cit.*, pp. 156, 157.

³ *Op. cit.*, p. 162.

will rest rather upon the results of a comparison of the cases in the Elviran code where separation is expressly mentioned as a condition precedent of Communion—or rather of admission to a fixed term of penance—with the cases where all mention of it is absent. If we can find any clear and consistent distinction between the two classes of cases, the presumption will be a strong one that, if separation is not mentioned in the latter cases, neither is it meant.

"1. In two cases of adulterous connexions separation is definitely named. Canon 64: 'If any woman have lived, and continued to the end, in adulterous union with another woman's husband, she may not be given even death-bed Communion; but if she leave him, then after ten years' "regular" [or possibly "genuine"] penance she may receive Communion.' Canon 70: 'If any woman have committed adultery with her husband's knowledge, it is resolved that he may not be given even death-bed Communion; but if after knowing of her adultery he have kept her with him for a certain time only, and then have left her, let him after ten years receive Communion.'

"2. In the case of marriages, with whatever other censure they are visited, separation is never mentioned.

"(a) Canons 8, 9: 'Women who without any excuse leave their husbands and unite themselves to other [husbands] may not receive Communion even on their death-beds.'

"'A Christian woman who has left an unfaithful Christian husband, and is marrying another, should be forbidden to marry; and if she do marry, let her not receive Communion in the lifetime of the husband she has left, save under necessity of illness.'

"(b) Canons 15, 16: Christian maidens may not be given in marriage to pagans, Jews, or heretics; parents who act against this prohibition are to be excluded from Communion for five years. [Similarly the 12th (11th) canon of Arles enacts that Christian

maidens who unite themselves to pagans are to be separated for a considerable time, 'aliquanto tempore,' from Communion.]

"(c) Canon 66 : 'If any man takes his step-daughter to wife, it is resolved that, seeing that the union is an incestuous one, he be not given Communion even on his death-bed.'

"(d) Canon 72 : 'If a widow commit adultery and afterwards marry her seducer, it is resolved that after five years' regular penance she may be reconciled to Communion ; if, however, she leave him and marry any other man, she may not receive communion even on her death-bed.'

"It can hardly be accidental that in no one of these cases of marriage, with whatever penalty they are visited, is any mention made of the separation of the married parties. We are, it would seem, almost compelled to deduce from the evidence as a whole the general conclusion that the Church's disapproval of particular kinds of marriage was, in the conception of the fathers of Elvira, to be effected by the purely ecclesiastical censure of exclusion from Communion ; in other words, the marriage law was still regarded as part of the province of the State. The Church, having as yet no Law in the later and stricter sense, but only a Discipline of which the sanction lay in excommunication, made no attempt to declare null a marriage which could be legally contracted ;¹ but it could and did say that such of its members as entered into unions permitted by the State, but regarded by the Church as falling below the ideal of Christian marriage, should forfeit their privileges

¹ But at any rate one of the *marriage*-canons adduced by Mr. Turner, namely the 66th, deals with a marriage which, according to heathen State-law, could not be legally contracted. See the passage from Ulpian quoted below on p. 171, n. 2. Yet in that canon also separation is not explicitly mentioned. It is clear, therefore, that the absence of mention of separation does not depend on the civil legality of the marriage.

of membership. Whether the forfeiture was temporary or permanent depended on the degree of disapproval which the particular union evoked; and from this point of view marriage with a deceased wife's sister was placed at Elvira in a different category from marriage with a step-daughter, and was visited with a lighter censure."¹

So far Mr. Turner. I suppose that, when he says that the Church had "as yet no Law in the later and stricter sense," he means that the Church could not look to the State to enforce (by the strong arm of physical coercion) her laws on her disobedient members, some of whom probably cared little for her spiritual censures, and contumaciously persevered in their contempt of her authority. That no doubt is an absolutely true description of the state of things during the first three centuries, and until the Peace of the Church was established in A.D. 313 by the Edict of Milan. But it was also true during the centuries which intervened between Constantine and Justinian, whenever the law of the Church on any matter differed from the law of the State on that matter. Yet the Church, both before and after Constantine, applied the term "law" both to the regulations which she regarded as divine, and also to the regulations which she put forth by her own authority. And even after the Edict of Milan she continued to use the same terminology, not only in cases where her law and the State law were in harmony, but also in cases where they were opposed to each other. From the very beginning the Church was conscious that she had a law to administer, which often differed from the law of the State, but which bound her own members.

Thus Athenagoras in the 32nd and 33rd chapters of his *Legatio pro Christianis*, addressing the Emperors

¹ *Op. cit.*, pp. 165-167.

Marcus Aurelius and Commodus in the year 177, says: "Our account lies not *with human laws* (ἀνθρωπικὸς νόμος), which a bad man can evade (at the outset I proved to you, sovereign lords, that our doctrine is from the teaching of God) . . . Therefore, having the hope of eternal life, we despise the things of this life, even to the pleasures of the soul; each of us reckoning her his only wife whom he has married *according to the laws laid down by us* (κατὰ τοὺς ὑφ' ἡμῶν τεθειμένους νόμους), and that only for the purpose of having children."¹ This assertion of the Church's possession of a law of her own is all the more telling for my purpose, on account of the fact that it was addressed primarily to the persecuting Emperor, Marcus Aurelius.

Similarly the Council of Nicaea (A.D. 325) speaks in its 13th canon of "the old and canonical law" (ὁ παλαιὸς καὶ κανονικὸς νόμος), which prescribed that, if any one is dying, "he should not be deprived of the last and most necessary *viaticum*." Here is a law of the Church, which was ancient in the time of the Nicene Council, and must, therefore, have belonged to the ages of persecution.

So S. Ambrose contrasts the laws of the Empire with the laws of God. In the midst of a long argument against divorce he says: "You therefore divorce your wife as if it were legal and there were no crime in the action (*quasi jure, sine crimine*); and you think that this is allowable to you, because the law of man does not forbid it; but the law of God does forbid it (*quia lex humana non prohibet; sed divina prohibet*). It would be well that you, who are

¹ Edit. Schwarz, Leipzig, 1891, p. 43. Athenagoras regarded all second marriages as inadmissible; but on that point he is out of harmony with the *consensus* of the Fathers and of all subsequent Catholic writers, and with the plain teaching of S. Paul. But in his assertion of the Church's possession of a law of her own, he is supported by the practice of the Church from the beginning, and by the explicit testimony of her great writers.

submissive to men, should fear God. Hear the law of the Lord (audi legem Domini), to whom those who make the laws¹ profess submission: 'What God hath joined together let not man put asunder.'"²

And S. Chrysostom, in his homily *in illud* "*Propter fornicationes autem*," says: "Do not bring up against me *those laws from without* (τοὺς ἑξωθεν νόμους), which drag women who have committed adultery into a court of justice, and exact penalties from them; but do not exact them from married men who violate their maid-servants: but I will recite to thee the law of God, which equally burns with indignation against the woman and against the man, and calls the act adultery."³

And the same S. Chrysostom, in his homily *De libello repudii*, says: "Do not recite to me the laws which have been enacted by those without, the laws commanding to give a bill of divorce and to put away. For in that day God will not judge thee by those laws, but by those which He Himself has made."⁴

Again, S. Chromatius, who was Bishop of Aquileia from 388 to 407, in his tenth Tractate on the Sermon on the Mount, speaking of re-marriage after divorce as practised by the Manichaeans, says: "They believe that they will not be punished for what they do, because it seems permitted by the laws of man and of the world, not knowing that hereby their sin becomes greater and more grievous, because they prefer the laws of men to the laws of God, in that what God has made unlawful, they believe to be lawful, because by man it has been freely allowed."⁵

Once more, S. Augustine, in the fifteenth book of his *De Civitate Dei* (chap. 16), discussing the cause of the infrequency of marriages between first cousins, even at a time when the law of the Empire allowed

¹ That is, the Emperors.

² *Exposit. Evangelic. secund. Luc.*, lib. viii. § 5, *P.L.*, xv. 1767.

³ *P.G.*, li. 213, 214.

⁴ *P.G.*, li. 218.

⁵ *P.L.*, xx. 351.

them, says: "But I have had opportunities of noticing, in regard to the marriage of first cousins, how, even in my own lifetime, on account of the degree of relationship being very near to that which connects a brother to a sister, that which used to be allowable by the laws was very rarely carried out in practice; for such marriage has not been forbidden by the Divine law, and at the time to which I am alluding it had not yet been prohibited by human law."¹ It should be noticed how clearly S. Augustine distinguished the human law from the Divine, even when they agreed. But the Divine law was immutable, whereas human laws could be changed, as in fact happened when the marriage of first cousins was prohibited by Theodosius. When S. Augustine asserts that these marriages have not been prohibited by the Divine law, he is of course alluding to the code in Leviticus, which prohibits marriage between persons related either by consanguinity or affinity in the first three degrees, but says nothing against marriage between persons related to each other in the fourth degree, and consequently allows the marriage of first cousins.

These passages from the Fathers, which range in date from the second century to the fifth, testify very clearly to the consciousness which the Church had that she was the guardian of divinely revealed laws about marriage, of far higher authority for her own children than each and all of the State laws on that subject which differed in their requirements from the laws of God. I cannot for a moment believe that Mr. Turner is right when, speaking of the first decade of the fourth century, he says that "the marriage

¹ S. Augustine, *De Civit. Dei*, xv. 16, *Opp.* ed. Ben., 1685, tom. vii. col. 398. S. Augustine must have been at least thirty years old when the Emperor Theodosius published the law which made the marriage of first cousins illegal, so far as the law of the Empire was concerned. Godefroi has shown in his comments on the Theodosian Code (lib. iii. tit. x.) that this law was enacted in 384 or 385.

law was still regarded [by the Church] as part of the province of the State. The Church having as yet no law in the later and stricter sense." With all deference to my friend's greatly superior learning, I cannot help arriving at the conclusion that the Church from the beginning regarded marriage as within her province, and, whenever the State laws differed from the laws of God concerning marriage, committed to her guardianship, rightly considered that her children ought to obey God in regard to that most fundamental institution rather than men.

It will perhaps help some to give a favourable consideration to my argument if I quote passages from the writings of two celebrated scholars, who enunciate principles which tend, I think, to support my present contention.

Harnack, in his *Constitution and Law of the Church in the First Two Centuries*, says: "The transformation of the Jewish Church and synagogue into the *Ecclesia* of God burdened and consolidated the Christian community *from the beginning*¹ and gave it a legislative system. But the conviction that it was the Messianic community of the latter days also led to legislative enactments, for as such it was bound to keep itself pure and holy, which in the last resort could be accomplished only by punishment and excommunication. Finally, it was bound to develop new rules of life, *i.e.* legislative enactments, because it claimed jurisdiction over the whole of the life and thought of its members, as well as their social relations to one another, and sought to bring everything into a new and fixed order."² Harnack seems here to imply that there were laws and principles which the *Ecclesia Dei* inherited in "the beginning" from the Jewish church, and also other laws which she enacted

¹ The italics are mine.

² Harnack, *Constitution and Law of the Church in the First Two Centuries*, Pogson's translation, p. 22, 1910.

for herself. And it is evident that, in Harnack's opinion, the Church regarded all these laws as having a higher claim on the obedience of her children than any State laws which differed from them; for in another passage of the same treatise he says: "Ecclesiastical law (in the wider sense and as applying to the natural relations of life) thus arose in the main from the necessity of replacing those laws and regulations in force in the State which Christianity was unable to recognize, by others dealing with similar conditions, and of improving those which Christianity was able to accept."¹

Similarly Döllinger, in his *Hippolytus and Callistus*, says: "The Christian Church found itself *from the outset*, without taking account of this action of Callistus,² in direct, although for some time longer quiet and secret, opposition to the Roman law of marriage. Cases not unfrequently occurred in which she was compelled to make it the duty of her children not merely to abstain from making any use of what the law allowed, as in the case of divorce, but even to oppose the will and purpose of the law."³ Döllinger goes on to give instances of this opposition of the Church during the first three centuries to certain parts of the heathen Roman law of marriage. The Church's opposition was in the earlier times quietly manifested by the administrative acts of her Bishops; afterwards, as at Elvira and Neo-Caesarea, canons bearing on these matters were openly passed by councils.

If there is any force in the preceding argument, it will follow that, during the first three centuries as

¹ Harnack, *op. cit.*, pp. 144, 145.

² Pope Callistus allowed, under certain circumstances, well-born Christian women of a certain rank in life to marry one of their slaves, although such a marriage was regarded by the State as null and void. Callistus was Bishop of Rome from 217 to 222.

³ Döllinger, *Hippolytus and Callistus*, Plummer's transl., pp. 156, 157.

well as in the subsequent centuries, the Church considered that, so far as her own members were concerned, her laws about marriage were of more binding authority than the marriage laws of the State. She did not dispute the State's right to make marriage laws; but if such laws were irreconcilable with her laws, she expected her children to be guided by herself rather than by the State. More especially was this the case in regard to those Church laws which were regarded by the Church as having a Divine origin.

No doubt the sanction of the Church's laws differed from the sanction of the State's laws. The Church punished her rebellious children by excommunication, and warned them of their danger of being cast into hell; whereas the State punished disobedient persons by fine or imprisonment or by judicially declaring them infamous, with all that that involved, or by other appropriate punishments. But to a believing Christian excommunication leading on to hell was far more terrifying than any penalties which the State could inflict.

These things being so, I cannot at all agree that the Church acknowledged the validity of all the marriages which the State regarded as valid. The State allowed divorce by mutual consent, and also allowed either party to put an end to the marriage by repudiating his or her spouse, and then, if either party or both remarried, the State regarded such remarriages, though contracted during the lifetime of the partner in the original marriage, as valid marriages. The Church regarded remarriages of this kind, if contracted by her children, as adulteries, and therefore as being no marriages either in the sight of God or in her sight. She could not, indeed, separate the parties to these adulterous unions by the use of physical force, but she regarded the so-called marriages as null and void.

I conclude from all this that one or other of two alternatives must be true. Either there must be some

flaw in Mr. Turner's argument based on his interpretation of certain of the canons enacted by the Council of Elvira, or, if his argument is solid, then the witness of the Council of Elvira, which was a purely local council, representing only the churches of Spain, must be set aside as embodying principles relating to marriage which were out of harmony with the general teaching and practice of the Catholic Church.

For myself, as at present advised, I am inclined to believe that the first of these two alternatives is to be preferred; and I address myself, therefore, to the task of investigating Mr. Turner's argument with some expectation of being able to show that the canons of Elvira, when properly interpreted, do not lead to the conclusion which he has drawn from them.

Mr. Turner bases his principal argument upon a comparison of the cases in the Elviran code, where *separation* is expressly mentioned as a condition precedent of admission to a fixed term of penance, with the cases where all mention of it is absent. "If," he says, "we can find any clear and consistent distinction between the two classes of cases, the presumption will be a strong one that, if separation is not mentioned in the latter cases, neither is it meant."¹ The distinction which he thinks that he discovers, is that separation is named in cases of adulterous connexions, and in proof he refers to canons 64 and 70; but that it is not mentioned in the case of marriages, and in proof he refers to canons 8, 9, 15, 16, 66, and 72.

To me it seems that separation is explicitly mentioned in two marriage cases, and that it is certainly presupposed in another. The 70th canon of Elvira, which Mr. Turner classes with canon 64 as dealing with a case of adulterous connexion, and as being a canon in which separation is definitely named, ought, I think, to be transferred to the other class of canons,

¹ *Church Quarterly Review*, lxvii. 165.

namely, the class containing the canons which deal with marriage cases. The canon in question runs thus: "If any woman have committed adultery with her husband's knowledge, it is resolved that he may not be given even death-bed Communion; but if after knowing of her adultery he have kept her with him for a certain time only, and then have left her, let him after ten years receive Communion."¹ Here there are two persons mentioned—(1) the wife who has formed an adulterous connexion, and (2) the husband who is united in the bonds of marriage to his wife. The canon says nothing about the penalty which is to be exacted from the wife on account of her adulterous connexion; it deals entirely with the husband, and puts pressure upon him to separate himself from the wife to whom he is bound by the marriage tie. If he is willing to separate from his wife as soon as he hears of her adultery, he is held free from blame. If he continues to live with her for a time and then separates himself, he has to undergo a penance of ten years, and after that may be admitted to Communion. If he refuses altogether to separate, he may not be admitted to penance, and still less to Communion even on his death-bed. In this canon the husband is assumed to be a layman. The 65th canon had already laid down that a clerk who had knowledge of the fact that his wife had committed adultery and did not immediately separate from her, was to be excommunicated and not received to penance even on his death-bed.² A subsequent separation

¹ I give here the Latin text of the 70th canon, as it stands in Dr. F. Lauchert's *Die Kanones der wichtigsten Altkirchlichen Concilien* (edit. 1896, p. 24): "Si cum conscientia mariti uxor fuerit moechata, placuit nec in finem dandam ei esse communionem; si vero eam reliquerit, post decem annos accipiat communionem, si eam quum sciret adulteram aliquo tempore in domo sua retinuit." The English translation in the text is Mr. Turner's.

² The following is the text of the 65th canon as given by Lauchert (*u.s.*): "Si cujus clerici uxor fuerit moechata et scierit eam maritus

of amendment, the Council sanctions her being absolved and communicated? The thing is inconceivable. This 9th canon of Elvira affords an excellent example of the danger of arguing *a silentio*. The Council presupposes in those who have to carry out its rulings some elementary knowledge of the principles which govern the Church in her administration of the Sacraments. One might refer to S. Augustine's treatise, *De Fide et Operibus*,¹ as containing a good discussion of those principles. He is discussing there the moral requirements which must be found in catechumens coming to be baptized; but his conclusions apply with still greater force to lapsed Christians who wish to be reconciled. No doubt S. Augustine wrote this treatise at least 107 years after the date of the Council of Elvira; but in such a matter as this, if the Church's moral standard had in any way changed, it would certainly be in the direction of laxity rather than of rigorism. Long before the time of S. Augustine, S. Paul wrote to his Corinthian converts "not to keep company, if any man that is named a brother be a fornicator . . .; with such a one no, not to eat."² If a Christian man who had committed a relatively lighter sin (viz. the sin of fornication) was to be debarred from ordinary social intercourse, how much more would a Christian woman, who had been living perhaps for years in a more grievous sin (viz. the sin of adultery), be restrained from sharing with the Church in participation in the Body and Blood of our Lord, until she had given proofs of her penitence, and had at least promised amendment of life, and therefore separation from adulterous connexion with the partner of her guilt.³

¹ S. Augustine, *Opp.* edit. Ben., 1685, tom. vi. coll. 165-192.

² 1 Cor. v. 11.

³ One must always remember that the form, which ancient canons took, often resulted from some particular case which had been brought to the notice of the Synod. To me it seems probable that the submission of some particular case to the Fathers of Elvira prompted them

Let us now pass on to consider other canons of Elvira cited by Mr. Turner in support of his contention. Some of these canons impose on those who have committed sins of special enormity the penalty of lifelong excommunication. Such persons are not to be restored to Communion even on their death-beds, however penitent they may be. Of course such canons make no reference to any separation of the adulterous or incestuous couple. As I have already pointed out, such a separation might avail them in the Day of Judgement, but it would have no effect at all in the way of procuring for them a restoration to Communion; and these canons are not dealing with their future condition in the world to come, but with their ecclesiastical status in the present life. It follows that canons 8 and 66¹ have no real bearing on the matter in hand.

The same considerations apply to canon 72. That canon deals with the case of a widow who, after the death of her husband, first enters into an adulterous connexion with A, and then, leaving him, marries B. The canon orders her to be punished by lifelong excommunication;² and as the excommunication

to enact their ninth canon, and determined its form. The case was probably of such sort that it did not lead them to consider what should be done to the woman if, after living with her paramour for some time, and being in no danger of death, she had voluntarily ceased to cohabit with him, and had expressed sorrow for her sin. For myself, I think that, if that variation from the other case had come before them, they would have been willing, at any rate in some cases, to admit her to penance for a certain period, and finally to restore her to Communion.

¹ They are quoted above, on pp. 147, 148.

² According to Lauchert (*ubi supra*) the text of the 72nd canon runs thus: "Si qua vidua fuerit moechata et eundem postea habuerit maritum, post quinquennii tempus acta legitima poenitentia placuit eam communioni reconciliari: si alium duxerit relicto illo, nec in finem dandam esse communionem; vel si fuerit ille fidelis quem accepit, communionem non accipiet, nisi post decem annos acta legitima poenitentia, vel si infirmitas coegerit velocius dari communionem." Mr. Turner translates the first part of the canon thus: "If a widow commit adultery and afterwards marry her seducer, it is resolved that after five years' regular penance she may be reconciled to Communion; if, however, she leave him and marry any other man, she may not

is to be lifelong, the canon, for reasons already mentioned, would not allude to separation even if it were possible. But in this case the marriage with B is a valid marriage, and for the woman to separate from the man, who in the sight of God and of the Church is her husband, would be merely adding sin to sin.

There remain only canons 15 and 16 to be considered; and they, to quote Mr. Turner's summary, lay down that "Christian maidens may not be given in marriage to pagans, Jews, or heretics." Certainly there is no mention here of "separation," and the reason is not far to seek. I can express that reason best by using the phraseology of the canonists. During the first five centuries the impediment of *disparitas cultus* was everywhere an *impedimentum impediens*, and not an *impedimentum dirimens* even when one of the parties was unbaptized; while, on the other hand, the impediment of *ligamen*¹ was everywhere in the first three centuries an *impedimentum dirimens*. In the Latin Church the impediment of *disparitas cultus*, so far as it applies to the marriage of a Roman-Catholic with a baptized non-Roman-Catholic, remains to this day an *impedimentum impediens*; that is to say, the marriage is forbidden, but, if it be contracted, it is held to be valid, though the Roman-Catholic party is liable to ecclesiastical censure. On the other hand, since the time of the publication of Gratian's *Decretum* (circa 1140) the impediment of *disparitas cultus*, so far as it applies to the marriage of a Roman-Catholic with an unbaptized Jew, Turk, infidel, or heretic, has been regarded in all parts of the Latin communion as an *impedimentum dirimens*; that is to say, the

receive Communion even on her death-bed." Mr. Turner adds in a note: "The remainder of this canon is of doubtful interpretation; but it does not appear to affect the problem before us."

¹ "*Ligamen*" is an impediment "*vi cuius nemo, vivente conjuge, aliud matrimonium inire potest.*" It has for its basis the unity and indissolubility of marriage.

marriage is not only forbidden, but is also regarded as null and void from the beginning.

I have said that during the first five centuries the impediment of *disparitas cultus* was *everywhere* an *impedimentum impediens*, and not an *impedimentum dirimens*, even when one of the parties was unbaptized. One may refer in illustration to the 11th canon of the first Council of Arles (A.D. 314), which decrees that Christian young women who are married to heathen husbands shall be separated from Communion "aliquanto tempore." And again the 14th canon of the Council of Chalcedon (A.D. 451) forbids readers and singers to marry heretical wives, or to give their children in marriage to heretics or Jews or heathens, unless these persons are willing to embrace the orthodox faith. "But if any one transgresses this decision of the holy synod, let him undergo canonical punishment." There is no trace in either of these canons of the forbidden marriages being regarded as null and void. Nor was the contemporary practice such as to compel us to read into the canon an unexpressed intention to annul these marriages. It was not until the Council *in Trullo* (A.D. 692) that marriages with heretics, and *a fortiori* with unbaptized heathen, were in the East ordered to be treated as invalid marriages. In the fourth and fifth centuries some of the greatest saints were the children of mixed marriages. Thus S. Nonna, the mother of S. Gregory Nazianzen, was married to the elder Gregory, who at the time of his marriage was an unbaptized member of a non-Christian or semi-Christian sect. Similarly S. Monnica, the mother of S. Augustine, was married to Patricius, an unbaptized man. Synesius was, before his conversion to Christianity, married to a Christian lady, and the marriage was solemnized by Theophilus, the Patriarch of Alexandria. So again, S. Clotilda was married to Clovis, while he was still an unbaptized heathen;

and at the end of the sixth century the Christian princess, Bertha, was married to the heathen Ethelbert, King of Kent; and there are many other cases of the same sort. It is difficult to believe that these marriages could have taken place if the Church at that time regarded mixed marriages with unbaptized persons as being no marriages at all.

It is, however, possible that in some places mixed marriages with *Jews* may have been regarded as invalid. There was a law promulgated by Theodosius I. in 388, which forbade Christians to marry Jews under the penalties of adultery. There was no similar law prohibiting Christians from marrying heathen Roman citizens. And if we look to the legislation of the Church, we find that in Gaul the second and third Councils of Orleans, held respectively in 533 and 538, required separation in the case of a mixed marriage between a Christian and a Jew or Jewess; though it is not clear that they permitted the Christian after separation to contract a new marriage. Mr. O. D. Watkins (*Holy Matrimony*, p. 493), speaking of the period of time which elapsed between the conversion of Constantine and the death of Justinian, sums up thus: "The practice of marriage between Christian women and heathen husbands, though it can never be said to be approved, becomes so common as to create a tradition which weighs to some extent with S. Augustine."

I have mentioned the publication of Gratian's *Decretum* as marking the time when the discipline according to which all marriages between Christians and unbaptized persons were regarded as null became fully established in all parts of the Latin communion;¹

¹ See Mgr. Rosset (Bishop of Saint Jean de Maurienne) in his *De Sacramento Matrimonii Tractatus*, Disp. iii. qu. i. art. x. sect. ii. punct. ii. div. iii., edit. 1895, tom. iii. p. 304, § 1723. He sets himself to prove the truth of the following proposition: "Saltem a saeculo duodecimo universalis facta est consuetudo irritans matrimonium fidelis cum infideli."

but in certain places it began earlier. It would appear from a letter written by the great canonist, Blessed Ivo of Chartres, who died a quarter of a century before the publication of Gratian's *Decretum*, that in his time the same discipline was already in force in France, or at any rate in the central portion of that country.¹

As, during the first five centuries, marriage with a pagan, Jew, or heretic was everywhere regarded as valid though prohibited, there could be no mention of separation in such canons as the 15th and 16th of Elvira, which deal with the subject of mixed marriages. But it would be most unsafe to argue from one impediment to another impediment. From the earliest times there have been diriment impediments, and there have been also impeding or prohibitive impediments. And the history of each separate impediment must be independently studied, before we can with any security decide whether it is to be placed in the first class or in the second. It is therefore quite inadmissible to argue that because in the fourth century the impediment of *disparitas cultus*, even when one of the parties was unbaptized, was only impeding and not diriment, therefore the impediment of affinity cannot in that age have had the effect of annulling marriage between persons related to each other by affinity within the prohibited degrees.

I have now shown that in two of its canons, namely, the 65th and the 70th, the Council of Elvira explicitly compelled Christian husbands to divorce their unfaithful wives *a mensa et toro*, and in another canon, the 9th, it must certainly be understood to imply that a woman, whose first and only real husband is still living, must separate from the man to whom she has been married by State law, on pain of being refused Communion when in danger of death. I

¹ Cf. B. Ivon. Carnotens. *Ep.* cxxii. *ad Vulgrinum Parisiensem Archidiaconum*, P.L. clxii. 135.

have also shown that the reason why separation is not mentioned in canons 8 and 66 is because those canons impose on certain classes of grievous sinners the penalty of lifelong excommunication, and separation would have no effect in mitigating that penalty; and, further, I have shown that separation is not mentioned in canons 15, 16, and 72, because the several impediments referred to in those canons were not regarded as diriment impediments, and the marriages to which the canons refer were therefore held to be valid and consequently indissoluble.

Unless I am completely mistaken, I have, I think, the right to say that the canons of Elvira cited by Mr. Turner do not justify the conclusions which he draws from them, and that therefore his principal argument in defence of his main thesis does not hold.

As I have already pointed out,¹ Mr. Turner allows that, in the case of a marriage between a brother-in-law and a sister-in-law, separation before admission to penance was the practice of the Eastern Church in the early part of the fourth century, and that it was also the practice in the West at the beginning of the sixth century, if not earlier; and having made these admissions, he adds: "When we find then that the canon of Elvira fixes five years' exclusion from Communion as the ecclesiastical penalty for contracting such a union, we should have good ground, upon contemporary Eastern and later Western evidence, for interpreting this exclusion for five years as additional to, and not as a substitute for, the dissolution of the marriage tie." He thinks, indeed, that "further inquiry points imperatively to the conclusion that" this interpretation "will not hold water"; but he expressly tells us that this conclusion rests mainly on the results of a comparison of two classes of cases mentioned in the Elviran canons; and I have, I think,

¹ See above, p. 146.

shown that his argument, based on the comparison which he institutes, does not hold.

This appendix is already longer than I had expected it to be, and I think that it is hardly necessary for me to discuss minutely certain arguments of less importance which Mr. Turner uses to prepare the way for his principal argument. But perhaps it will be well for me to deal with one of them.

With the object of showing that, when the Council of Elvira imposed a penance of five years on a man who should marry his deceased wife's sister, it did not necessarily require the man to separate from his partner before being admitted to penance, Mr. Turner refers to the discipline in regard to second marriages which in early times was in vogue in some Churches. He says that that case "appears to provide us with just the parallel we want": and then he goes on to point out that, while "no theoretical questioning of the validity of second marriage was permitted in the Church, yet there is plenty of evidence that to the contraction of these valid unions a term of penance was often, perhaps generally, attached."¹ This statement is no doubt substantially true, although I do not remember any passage which testifies to the imposition of penance on digamists in the Catholic West. But obviously digamy and marriage within the prohibited degrees are very different things; and it is not permissible to conclude from the way in which the one was treated that the other was treated in the same way. S. Paul had plainly declared that "a wife is bound for so long time as her husband liveth; *but if the husband be dead, she is free to be married to whom she will*; only in the Lord."² But which of the inspired writers has ever stated or implied that a man is free to marry his sister-in-law? As I have

¹ *The Church Quarterly Review* for October 1908 (vol. lxxvii. pp. 163, 164).

² 1 Cor. vii. 39.

shown, the law of God plainly declares that none "shall approach to any that is near of kin to him, to uncover their nakedness"; and it goes on to teach that the nearness of kin mentioned in this law arises from affinity as well as from consanguinity, and that relationship within the first three degrees of either affinity or consanguinity is a bar to marriage, and that in particular a brother-in-law may not marry his sister-in-law. And, further, God's law goes on to declare that it was because of their violation of these holy laws about marriage that the land of Canaan had vomited out the Gentile inhabitants who had preceded the Israelites in their occupation of the country. Such marriages, whether contracted by Israelites or Gentiles, were in the eyes of God an abomination: and all the positive evidence that we possess shows that the Catholic Church had learnt from our Lord to regard as obligatory the standard of purity which had been promulgated under the old covenant, except so far as that standard had been made stricter by the legislation of the Gospel. Christ came not to destroy the law, but to complete it. And so we find the Council of Neo-Caesarea, which was practically contemporary with the Council of Elvira, requiring a promise of separation as a condition of the reconciliation of a dying woman married to her brother-in-law. And, further, the evidence goes to show that, putting aside for the moment the Spanish bishops assembled at Elvira, all the Churches, whether in the East or West, reprobated as unlawful and abominable such marriages during the early centuries of our era. If any one thinks that the Spanish Church in the first decade of the fourth century was an exception, the *onus probandi* lies on him. Digamy was, no doubt, regarded by the early Church as something which, though it was not in itself sinful, nevertheless fell below the *ideal* of Christian marriage, and normally implied a lack of Christian self-

restraint.¹ But marriage with a sister-in-law was regarded as sinful and hateful to God, and in fact as incestuous, and therefore null and void.

Mr. Turner does indeed make the following statement in a note: "It would be rash, we think, to assume that even the fathers of Neo-Caesarea treated the marriage of a woman with her deceased husband's brother as null, in the sense that either of the parties to it was free to contract another union which would have been regarded as valid and legitimate."² I may be very perverse, but to me it would seem that the charge of rashness is incurred by those who make the opposite assumption. What single shred of evidence is there, either in Scripture or tradition, which suggests that such marriages were anything but null and void?³ As I have already pointed out, the Levitical code makes not the slightest distinction between the marriage of a son with his mother and the marriage of a brother-in-law with his sister-in-law.⁴ Of course, in the first case the parties are related *in linea recta* in the first degree of consanguinity, while in the second case the parties are related *in linea laterali* in the second degree of affinity, and consequently the first case is very much more horrible than the second. But nevertheless both cases are cases of incest, and they are both classed together as being in the sight of God "abominations." To take a somewhat parallel case, parricide is a more dreadful crime than simple murder, but both are capital offences. I can hardly suppose that any Christian could be found who would regard the marriage of a son with

¹ S. Paul himself evidently agreed in principle with this view. He would not allow a digamist man to be ordained (see 1 Tim. iii. 2, 12; Tit. i. 6), nor a digamist widow to be put on the roll of professed widows (see 1 Tim. v. 9).

² *Church Quarterly Review* for October 1908 (vol. lxxvii. p. 167).

³ It is only those, whom God has joined together, that man is forbidden to put asunder; and how can God be supposed to have joined together persons whose quasi-conjugal union He regards as an "abomination" (cf. Lev. xviii. 16 and 29)?

⁴ See above, p. 57.

his mother as being in any sense a real marriage; and there is no hint in the Bible that among the prohibited degrees mentioned in the Book of Leviticus there are two classes, one containing the degrees which create a diriment impediment, and the other containing the degrees which create a merely impedient or prohibitive impediment. Certainly the law of England, both ecclesiastical and civil, has from the time of our country's acceptance of Christianity regarded all the divinely prohibited degrees as equally creating a diriment impediment.¹ S. Basil in the fourth century says quite clearly: "If any one, overcome by impurity, falls into unlawful intercourse with two sisters, *this is not to be looked upon as marriage*, nor are they to be admitted at all into the assembly of the Church until they have separated from one another."² The reason why the parties were to be separated, before being admitted to penance, was, as S. Basil indicates, because their union was not marriage, but incestuous fornication. The *vinculum* of marriage binding them together did not exist, and therefore there was no Divine law which hindered either party after separation from contracting a lawful and valid marriage with somebody else. Even if the laws of the State had regarded their incestuous union as marriage, those same laws allowed the parties to divorce each other by consent, and they also allowed either of the parties to repudiate the other, so that the State recognition of an ecclesiastically invalid marriage set up no permanent barrier to the parties remarrying;

¹ This is unmistakably implied by Lord Chancellor Hatherley (see above, p. 57, n. 1).

² See above, pp. 60, 61. And it must be remembered that S. Basil is not professing to formulate in this passage a mere personal opinion of his own. He is professing to state the Church's "custom, which has the force of law, because the rules (*τοὺς θεσμούς*) have been handed down to us by holy men." Liddell and Scott say concerning the word *θεσμός*, that it is used "properly of ancient laws supposed to be sanctioned by the gods."

and even if it had, the legislation of Callistus¹ in the first quarter of the third century proves to demonstration that the Church claimed and exercised the right to sanction marriages which the State refused to recognize.

I must now bring this discussion to a close, and in doing so I submit to my readers that no sufficient reason has been given to make us suppose that the Council of Elvira allowed a man who had united himself to his deceased wife's sister to regard that union as a real marriage union, and to continue to live with her as her husband. There can, I think, be no doubt that the Council assumed that it would be understood that he would have to separate from his partner in sin before he could be admitted to penance. The Spanish Church formed no exception to that general consensus of all other Catholic Churches both in the East and West, which regarded a marriage between a brother-in-law and a sister-in-law as incestuous,²

¹ See above, p. 154, n. 2, and compare the passages from Harnack and Döllinger quoted on pp. 153, 154.

² It may perhaps be objected that the 61st canon of Elvira does not use the word "incestus," whereas the 66th canon, which orders lifelong excommunication to be inflicted on a man who marries his step-daughter (*privignam*), contains the clause, "eo quod sit incestus." But I think that there can be no doubt that that clause refers to the language of the law of the heathen Roman State. The great jurist Ulpian, who died in the year 228, says in his *Liber singularis Regularum* (tit. v. *de his qui in potestate sunt*, §§ 6, 7, edit. Huschke, Lipsiae, 1874, p. 14): "Eam denique quae noverca vel *privigna* vel *nurus* vel *socrus* nostra fuit, uxorem ducere non possumus. Si quis eam, quam non licet, uxorem duxerit, *incestum* matrimonium contrahit, ideoque liberi in potestate ejus non fiunt, sed quasi vulgo concepti spurii sunt." The Fathers of Elvira mean by their clause "eo quod sit incestus," exactly what S. Paul meant when he said, "such unlawful marriage as is not even among the Gentiles." On the other hand, marriage with a sister-in-law was not forbidden by the law of the heathen Roman Empire. It was not, in the language of State law "incestuous." Moreover, it is to be observed that the word "incestus," which occurs only once in the Vulgate, namely in Lev. xviii. 17, does not occur in that place in the old Latin version, nor, as far as I am aware, in any other passage of that version. As one might expect, Tertullian, who, though probably not a lawyer, was extraordinarily

and as null and void in the sight of God and of His Church.

learned in the law, does occasionally use it ; but it did not, I think, enter into the theological language of Latin-speaking Christians generally until a later age than that of the Council of Elvira. In Lev. xviii. 17, the Würzburg *codex* of the *Vetus Latina* has "impietas," where the Vulgate has "incestus"; and in the same place the Lyons Heptateuch has "injustitia." The R.V. has "wickedness" in the text, and "enormity" in the margin. When in later times Latin-speaking Christians generally adopted the convenient word "incest" to describe marriages within all the degrees prohibited by God's law, they were not bringing in a new doctrine, but were giving to an old legal term that extended meaning which was suited to the stricter moral code of Christ's religion. These considerations will, I hope, enable my readers to understand why the word "incestus" is not used by the Fathers of Elvira in their 61st canon.

APPENDIX II

ON A DECRETAL OF POPE INNOCENT III., WHICH
DEALS WITH THE CASE OF CERTAIN HEATHEN
MEN WHO HAD MARRIED THEIR BROTHERS'
WIDOWS TO RAISE UP SEED TO THE
BROTHERS WHO HAD DIED CHILDLESS
(see p. 96, n. 1)

IN the *Corpus Juris Canonici* (*Decretall.* iv. xix. ix), there is a Decretal Letter, or rather a certain part of such a letter, addressed by Pope Innocent III. "to the Livonian Bishop and to the brethren who are with him." This fragment of a letter is commonly known as the chapter "*Deus qui Ecclesiam suam et infra Quia.*" In the course of the letter the Pope says: "Because the usage in the Church of the Livonians, who have lately been converted to the Catholic faith, differs from our usage, we allow them, on account of the weakness of that [newly converted] people, to continue to live in conjugal union with the widows of their brothers whom they may have formerly married; on condition always that, their brothers having died without issue, they married such persons in order to raise up seed to their departed brothers, according to the law given by Moses. But we forbid that any Livonians should unite themselves to such in the future, after they have come to the faith."

The principle underlying Pope Innocent's decision seems to me to be thoroughly sound. The dispensation

granted by God in ancient days to the people of Israel, allowing them, on account of the hardness of their hearts, to retain that very primitive levirate custom, which, in common with many other nations, they had practised long before the time of Moses, was felt by Innocent to be part of the civil law of Israel, and not of the moral law. It was not, therefore, taken over by the Church, and was not applicable to baptized Christians. Christians could not validly contract such marriages. They could not shelter themselves under the Divine dispensation set forth in Deuteronomy xxv. 5-11; they were bound under all circumstances, without exception, by the moral law expressed in Lev. xviii. 16.

On the other hand Israelites who lived before the Incarnation, or who, even if they lived after the Incarnation, remained outside the new covenant of grace, could claim the benefit of the Divine Deuteronomic dispensation, and could validly marry their deceased brothers' widows, if their brothers had died without male issue. On account of the hardness of their hearts, they were not compelled to rise up to the Divine ideal of marriage in this particular matter. And if this was true of unconverted Israelites, it was surely also true of Gentile heathen nations, who had inherited the levirate custom, and therefore it was true of the heathen Livonians. The Church had no right to mete out to them harder measure, when they were converted to the faith of Christ, than she meted out to Israelites on their conversion. In both cases levirate marriages, contracted before baptism, were valid marriages, and must therefore stand good after baptism.

The principle laid down, or at any rate implied, by Innocent III. is accepted by S Bonaventura in a passage of his Commentary on the fourth Book of *The Sentences*;¹ but he does not express it with quite the

¹ In 4th *libr. Sententi.* dist. xxxix. art. ii. quaest. iv., *Opera omnia*, tom. iv. pp. 841 *et seqq.*, edit. 1889, ad Claras Aquas.

same accuracy. The general question, which he is discussing, is—"Whether the marriage of non-Christians is dissolved when they come to the Faith?" And in the course of his "conclusion" he lays down that neither Christians nor non-Christians can contract marriage within the degrees prohibited by the Divine Law in Leviticus xviii., "in which chapter the second degree is prohibited" (*ubi prohibetur secundus gradus*); and if a non-Christian contracts such an unlawful marriage, it is dissolved when he comes to the Faith. "It follows," he says, "that if a Jew contracts marriage with his sister in the second degree (*cum sorore in secundo gradu*), when he comes to the faith he is separated from her." Here I must interpose a remark. I have to confess that the expression, "a sister in the second degree," is new to me. I suppose that it is equivalent to a "soror patruelis," which means "a first cousin on the father's side."¹ In that case S. Bonaventura differs from S. Augustine and the great majority of Catholic writers, but agrees with S. Ambrose and S. Gregory the Great² in holding that marriage with first cousins is prohibited by Lev. xviii. He had already seemed to imply that that was his view, when he had said, as stated above, without any qualification, that the second degree is prohibited by the Divine Law in Lev. xviii. The real truth is that aunts and nieces are prohibited in the second degree, but first cousins are allowed. Of course S. Bonaventura uses the later Latin method of computing the degrees. I now return to my quotation from S. Bonaventura's *Conclusio*. He goes on to say: "But if he [*i.e.* the Jew] has contracted marriage with his brother's wife, he is by no means to be separated, because such a marriage is permitted in the law." No doubt S. Bonaventura has in mind the Divine dispensa-

¹ A "soror consobrina" ought to mean a first cousin on the mother's side, but whether the expression is so used, I do not know.

² See above, pp. 75, 76.

tion recorded in Deut. xxv. 5, whereby the levirate custom was allowed under certain exceptional circumstances to be continued among the Israelites. Pope Innocent, who was dealing with the actual case of the Livonians, had carefully limited his permissions to the occasions when the brother had died childless; but S. Bonaventura, who was probably theorizing in his cell, forgot the general prohibition of marriage with a brother's widow (Lev. xviii. 16), and transformed the exceptional dispensation into a universal law, so far as the Jews were concerned.

Some of the papalist writers of the sixteenth century, in the controversy which arose over King Henry's divorce, strayed still further away from the truth. They actually thought that the Deuteronomic dispensation was applicable to baptized Christians, and they defended the validity of Henry's marriage with Katharine on the ground that his brother Arthur had died childless. Johann Dobenek, who published his books under the name of Cochlaeus, is one of the authors who took this most untenable line. His argument will be found in his *De Matrimonio serenissimi regis Angliae Henrici Octavi Congratulatio disputatoria*,¹ addressed to Pope Paul III. soon after his accession.

¹ Edit. 1535, on the pages marked c2 and c3.

APPENDIX III

ON TWO LEGENDARY DISPENSATIONS PERMITTING MARRIAGE TO BE CONTRACTED WITHIN THE DEGREES PROHIBITED BY THE LAW OF GOD AND ALLEGED BY SOME WRITERS TO HAVE BEEN GRANTED BY POPE MARTIN V. (see above, on p. 107, n. 2)

1.—I HAVE quoted in the text of Chapter VI.¹ a passage from S. Antoninus of Florence in which he gives an account of a certain dispensation granted after much hesitation by Pope Martin V. The dispensation permitted a certain man to continue to live in conjugal relations with the woman whom he had married, notwithstanding the fact that, before he had married her, he had sinned with her sister. S. Antoninus was naturally shocked at such an unheard-of dispensation being granted by a Pope; but on account of his reverence for the papal dignity, he does not dare to speak his full mind about it, and contents himself with concluding that "the matter must be left to the judgment of God."

Some later writers misunderstood the story as told by S. Antoninus, and represented the dispensation as having been of a far worse character than it really was, although the original grant was bad enough.

Thus a certain beatified casuist, who died during the pontificate of Alexander VI. in 1493, and is known

¹ See above, pp. 105, 106.

as Blessed Angelus de Clavasio,¹ repeats S. Antoninus's story in the following horrible form. He says that "the Archbishop of Florence"—that is, S. Antoninus—"tells us that he had heard from persons worthy of credence that Pope Martin V., after consulting with many very learned theologians and canonists, granted a dispensation to a man who had taken to wife *his own sister* (germanam suam), on account of the many evils and scandals which would have happened if he had put her away, and which could not be avoided unless such a dispensation were granted."² Blessed Angelus adds: "And I say the same concerning similar cases" (et idem ego dico de similibus). If this was the morality taught by writers who were thought worthy of beatification, and who belonged to the age of Alexander VI., the life of that Pope and his amazing dispensations become more comprehensible.

De Clavasio's version of S. Antoninus's story was accepted as correct by Parisio, Cajetan, Sylvester, Gonzalez, and other writers.³ On the other hand, Raynaldus in his annals (s.a. 1431) rejects it with horror. This version of the story was based upon a mistake, and was no doubt wholly untrue. There seems to me to be no sufficient reason for doubting the truth of the original story as told by S. Antoninus.

The fact that Pope Martin V. did issue a dispensation permitting a certain man to continue to live in conjugal relations with a woman who was related to him in the first degree of affinity,⁴ may not improbably have helped to propagate the notion that that same Pope granted a dispensation to John, Count of Foix,

¹ He was Vicar-General of the Observantines.

² De Clavasio's *Summa Angelica*, s.v. "Papa" (Rocaberti's *Bibliotheca Maxima Pontificia*, tom. iii. p. 620).

³ I make this assertion on the authority of Dr. A. G. Mortimer in his little tractate entitled, *Papal Dispensations for Marriage within the Prohibited Degrees* (p. 10).

⁴ I use in this case the mode of numbering the degrees adopted by the mediaeval Latin canonists.

permitting him to marry Blanche, the sister of his deceased wife, Joan or Juana, daughter of Charles III. King of Navarre by his wife, Leonora of Castille; whereas there is no proof that any such dispensation was ever issued, and to me it seems almost certain that it was not issued; and in any case it was not issued directly by the Pope.

Natalis Alexander,¹ Francesco Pagi,² Rigantius,³ and other weighty writers accept this legend, and state, as if it was an indubitable truth of history, that Pope Martin authorized John of Foix to marry Blanche of Navarre, his deceased wife's sister. Rigantius, indeed, either by a slip, or in consequence of a printer's error, substitutes Bavaria for Navarre, but he is evidently recounting the same story as the others, and he refers to Natalis Alexander, F. Pagi, and others as his authorities.

All these writers base their statements ultimately on an apostolic letter of Pope Martin the Fifth's which was first published (*circa* 1662) by Raynaldus in his Annals.⁴ He found the letter, or rather a copy of it, in Martin's Register, and the volume containing that copy is still preserved in the Vatican Archives. The Rev. H. M. Bannister has at my request most kindly verified Raynaldus's reference. He examined the *Regist. Martini V. de Curia* (ann. i., ii., liber. i.), and in that volume, on foll. 126^b–128^a, he discovered the copy of the document published by Raynaldus. This document was copied into the Register by the notary, John Cordiverius, who also copied the preceding and subsequent letters, and, in fact, the greater part of the contents of the volume. The letter appears in its true

¹ *Hist. Eccl.*, edit. Bingii ad Rhenum, 1789, tom. xvii. p. 14.

² *Breviarium Historico-Chronologico-Criticum*, edit. Antwerp, 1727, tom. iv. p. 515, sect. lxxxviii.

³ *Commentaria in Regulas, Constitutiones, &c., Cancellar. Apost.*, Reg. xlix. nn. 32, 33, edit., Rom., 1747, tom. iv. p. 11.

⁴ Raynald. *Annal. Ecclesiast.*, edit. Mansi, Lucae, 1752, tom. viii. pp. 500, 501, s.a. 1418, nn. 34, 35.

chronological order, and in the same handwriting as the documents registered before and after it, and the handwriting is certainly of the first quarter of the fifteenth century. There seems, therefore, to be no room left for doubt as to the genuineness of the document. I am sincerely grateful to Mr. Bannister for sparing so much of his precious time, in order to find the answers to the many questions which I sent to him in connexion with this matter.

The letter is addressed by Pope Martin to his venerable brother, John, [Cardinal] Bishop of Ostia, and to his beloved sons, John, Cardinal Priest of the title of S. Sixtus, and Peter, Cardinal Priest of the title of S. Chrysogonus. It is dated from Geneva on the Ides of June in the first year of Martin's pontificate, that is to say, on June 13, 1418.

The three cardinals, to whom the letter is addressed, are very well-known persons. The first is Jean de Brogny, who in his capacity as Dean of the Sacred College often presided over the Council of Constance. It was he who, after Martin's election to the Papacy, ordained him first to the priesthood and then to the episcopate, and who also officiated at his coronation. The second is the Blessed John Dominici, a Dominican, and Archbishop of Ragusa; and the third is the celebrated Pierre d'Ailly, Bishop of Cambrai.¹

The dating of the letter is in perfect accordance with known facts. Martin, after leaving Constance on May 16, 1418, entered Geneva on June 11 of the same year, and stayed there till the following 4th of September.

It will now be necessary to give a summary of this

¹ About five weeks before the issue of this commission, namely on May 8, 1418, Martin, who was then at Constance, addressed a bull to two of these three Cardinals, namely John Dominici and Pierre d'Ailly, together with Peter Fernandez de Frias, Cardinal Bishop of Sabina, committing to them or to any two of them the duty of inquiring into the life and miracles of the Cardinal Deacon, Peter of Luxemburg. See the *Acta SS.*, tom. i. Jul., p. 614.

important letter. Pope Martin tells the three Cardinals that a petition has been presented to him from his beloved son, the noble man, John, Count of Foix, and from his beloved daughter in Christ, the noble woman, Blanche, the eldest surviving daughter and heiress of his dearest son in Christ, Charles King of Navarre,¹ and also from the prelates, nobles, magnates, inhabitants, and universities of the kingdom of Navarre and of the dominions of the Count of Foix. These petitioners declare that there have been in the past contentions, enmities, &c., and that for the appeasing of these a marriage was formerly contracted between the said Count and Juana, the eldest-born daughter and heiress of the said King, and that this marriage had been consummated, but that Juana had died childless; and that the petitioners greatly desire, with a view to the preservation of peace, that the said Count may be allowed to marry the said Blanche, notwithstanding the impediment of affinity which bars the way: the petitioners therefore beg the Apostolic See to grant a dispensation. The Pope goes on to say that, although he desires to promote all these advantages, and although he has been repeatedly advised by masters and doctors, "tam in sacra pagina quam jure," and very specially by his beloved Gallican sons and by the greater part of the commissaries of other nations in the sacred General Council of Constance, who assert that a dispensation of this kind can *de jure* be granted, and although he has learnt from many leading nobles and prelates of those countries that such a dispensation will be not only useful but supremely necessary, and that, if it is not granted, great scandals and horrible contentions will be caused, "nevertheless, in order that we may proceed in this matter 'exactissima diligentia

¹ It is curious that the Pope makes no reference here to the fact that Blanche was the Queen Dowager of Sicily. She had been married in 1402 to Martin of Aragon, King of Sicily, who had died on July 25, 1409.

et consultius,' we grant a commission to your circumspect Lordships, so that, when you have taken counsel of the most skilful masters 'in sacra pagina' and doctors 'in jure' about this dispensation, as to whether by Divine and human law it can be granted, you should fully inform yourselves by our authority from trustworthy witnesses as to whether from this dispensation and marriage, peace and concord between the King and the Count will follow, and, if through these counsels and information you find that this dispensation can *de jure* be granted, and that an enduring peace will follow, as to which points we lay the responsibility on your consciences (vestras conscientias oneramus), then you may grant a dispensation to John and Blanche, so that, notwithstanding the impediment of affinity, they may intermarry, and abide in that marriage freely and lawfully, and you may decree that the issue of such marriage will be legitimate."

I will now draw the attention of the reader to certain important points arising out of the contents of this letter, which need to be emphasized.

1. The letter does not profess to grant the dispensation for which the petitioners asked. The Pope is not at all sure whether it can be granted. He commissions the three Cardinals to make further investigations, taking counsel of the most skilful divines and canonists and lawyers as to whether the issuing of such a dispensation is allowable, having regard both to the laws of God and to the laws of men. They are also commissioned to take evidence on the question whether an enduring peace will result from the marriage of John and Blanche.

2. Even if all these questions are answered in the affirmative, the Pope does not propose personally to issue the dispensation. He lays the responsibility of determining that the dispensation can be granted on the consciences of the three Cardinals; and, if they

are satisfied, he authorizes them to dispense. As every one knows, there is a great difference between a decree emanating from a cardinalitial congregation and a decree directly emanating from the Pope.

3 On the other hand, the letter bears witness to the fact that during the 110 years which had elapsed since the death of Duns Scotus, his new doctrine about the human origin of the diriment impediment of affinity had made great way among divines and canonists. There is, indeed, no reason to think that the Council of Constance made any official declaration in favour of the Scotist doctrine about affinity, as twenty-one years afterwards (1439) the Council of Basle, which inherited much of the spirit and traditions of the Council of Constance, did in favour of the Scotist doctrine of the immaculate conception of the Blessed Virgin. The records of the Council contain no reference to the proposed marriage between John and Blanche, or to any questions connected with that proposed marriage. At least I have failed to discover any such reference. But the Pope's letter shows that many of the members of the Council favoured the Scotist view. Under the next Pope, Eugenius IV., the pendulum seems to have swung back to the traditional teaching of the Church.¹

But the question which the reader wishes to have answered is, no doubt, the question—What did the three Cardinals decide to do? What was the upshot of their investigations and deliberations? To that question no certain answer can be given. If they ever took any definite action, the record of such action has either perished or at any rate has never been published.

What is quite certain in regard to the matter is that John of Foix never married Blanche of Navarre. A treaty of marriage between her and Don John of

¹ See above, pp. 108–110.

Aragon, Duke of Pennafiel, was concluded on the 5th of November 1419, and the marriage was solemnized at Pampeluna, the capital of her father's kingdom, in 1420.¹

It may be suggested that perhaps the proposed marriage was broken off in consequence of some personal quarrel between the parties, or some political rupture between the Count of Foix and his father-in-law, the King of Navarre. But it does not seem at all likely that there is any truth in either of these suggestions. Not only is there no evidence of any such quarrel or rupture, but there is, on the contrary, evidence of an opposite state of things. John of Foix was present at Blanche's marriage with Don John of Aragon,² and on July 17, 1420, he entered into a treaty of close alliance with Don John, by which treaty the two parties bound themselves to come to the succour of each other against all their enemies.³ The Count of Foix took for his second wife Jeanne d'Albret, of the great house of Albret, to whom he was married in 1423; and after her death he took for his third wife, in 1436, Juana of Aragon, a daughter of the Count of Urgel; but he himself died a month later. Blanche became Queen of Navarre on her father's death in 1425, and she died in 1441. Her husband, Don John, became King of Aragon in 1458, and died in 1479, leaving his kingdom to his son by a second wife. That son was the celebrated Ferdinand the Catholic, the reputed father-in-law of our King Henry VIII.

On the whole, it seems to me to be most probable that the three Cardinals came to the very wise and

¹ See Gabriel de Chappuys' *Histoire du Royaume de Navarre*, edit. 1596, p. 385, and Flourac's *Jean 1^{er}, Comte de Foix*, edit. Paris, 1884, p. 95.

² Flourac, *op. cit.*, p. 96, mentions this fact, and gives a reference to Yanguas' *Diccionario de antigüedades del reino de Navarra*, i. 139.

³ Flourac prints the text of this treaty in his Appendix of *Pièces Justificatives* (*op. cit.*, pp. 266-268).

Catholic conclusion that the Pope had no power to dispense from the Divine law, and that the proposed marriage between a man and his deceased wife's sister was forbidden by that law. Such a decision would have been in harmony with Scripture and tradition and with the immemorial practice of the Roman Curia; and it would entirely account for the matrimonial negotiations having been brought to an end without any quarrel having arisen between the house of Navarre and the house of Foix.

In any case, it is clear that the notion that Pope Martin V. granted a dispensation to John of Foix to marry his sister-in-law is a baseless notion, which rests on a misapprehension of the purport of the Papal letter addressed by Pope Martin to the three Cardinals.

It therefore remains true that Alexander VI. was the first Pope who dared to put into practice the revolutionary theories of Scotus, and to allow by dispensation a marriage to be contracted within the degrees prohibited by the law of God. He was a very fitting person to corrupt the Church by such a deed of darkness.

APPENDIX IV

ON THE PRINCIPAL CHANGE WHICH WAS WROUGHT
BY LORD LYNDHURST'S ACT IN 1835. WHAT
THAT CHANGE WAS, AND WHAT IT WAS NOT
(see above, p. 124, n. 14)

IT appears that there are even now persons so ill-informed as to be possessed with the idea that, up to the year 1835, both the Church and the State in England held marriages contracted within the prohibited degrees to be valid marriages, though liable to be dissolved by the Ecclesiastical Court, if in either a criminal or civil suit the question of the legitimacy of the marriage came at any time before the Court for adjudication. It is supposed by these persons that the principal effect of the Act of 1835 (5 and 6 Will. IV. ch. 54), commonly called Lord Lyndhurst's Act, was to put an end to this state of things, and for the first time to make marriages within the prohibited degrees invalid *ab initio*.

This notion is wholly erroneous. No Ecclesiastical Court in England has ever claimed or exercised the power to dissolve a marriage, which had been previously a valid marriage. In 1857, twenty-two years after the passing of Lord Lyndhurst's Act, Parliament for the first time conferred such a power on a new State Court, which it created in that year, and which is known as the Court of Probate and Divorce. That new Court received from the State power to dissolve marriages previously good and

valid on account of the proved adultery of one or other of the parties. But the Church Courts have never had such a power, for the very good reason that the Church has always held marriage to be indissoluble.

But even this new State Court does not profess to dissolve marriages contracted within the prohibited degrees; they have always been regarded as absolutely null and void from the beginning; and as they are null and void, there is nothing to dissolve. During the whole course of English history, since the country became Christian, if for any reason such an incestuous union came before the Court, it issued no sentence of dissolution; it simply made a judicial declaration that there had never been any real marriage, and that the semblance of marriage was, and always had been, a semblance and nothing more. This decree of the Court is called a declaration of nullity.

Over and over again this has been the doctrine of our great writers on the law, and of our great judges declaring the law, when sitting on the judgment seat.

Thus Lord Chancellor Hatherley "described the notion that, until Lord Lyndhurst's Act invalidated marriages with a deceased wife's sister, they were only voidable, as a 'common blunder' and 'a gross mistake,'" adding that "such marriages were absolutely invalid at all times by our law, and from the time of Henry VIII. had been so dealt with by statute."

Another Lord Chancellor, Lord Campbell, repudiated the "false belief that till Lord Lyndhurst's Act a marriage between a man and his deceased wife's sister was perfectly legal, whereas it always was, and I hope ever will be, deemed incestuous; and the only defect to be remedied was the imperfect procedure for declaring its illegality."

Lord Wensleydale, sitting as a judge in the House of Lords, said: "My opinion is, that by the law

of England the marriage of a widower with his deceased wife's sister was always as illegal and invalid as a marriage with a sister, daughter, or mother was."

Lord Chelmsford, who was at one time Lord Chancellor, delivering his judgement in the House of Lords in the case of *Fenton v. Livingstone*, said: "The marriage of the parents of the respondent having taken place prior to 1835, it is necessary to consider what was the law of England with respect to a marriage with a deceased wife's sister before the Act of Parliament of that year. I think it cannot properly be questioned that such a marriage was void *ab initio*."

I have taken these four quotations from eminent judges from *A Letter to the Diocese of Canterbury*, entitled *The Deceased Wife's Sister Marriage Act*, 1907, by the present Archbishop of Canterbury¹ (see pp. 33, 34, 58, 59 of that *Letter*).

It is clear that the principal change wrought by Lord Lyndhurst's Act in 1835 was not to invalidate marriages within the prohibited degrees which had been valid before, but to remedy the imperfect procedure for declaring their illegality and nullity.

¹ Dr. R. T. Davidson.

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